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ABSTRACT

Selected legal problem areas for sectarian and nonsectarian private schools that have generated substantial litigation and frequent questions from nonpublic school administrators and faculty are discussed. Major topic headings include tort liability, constraints on student and faculty discipline, governing board liability, governmental regulation of nonpublic schools, federal antidiscrimination legislation, and practices and limitations of copyright law. Each major heading is followed by a series of subheadings to facilitate use. (TE)

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Legal Problems of Religious and Private Schools

Ralph D. Mawdsley
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A Publication of
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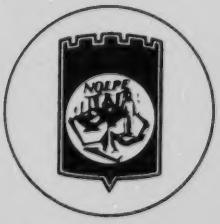

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Foreword

Nonpublic schools, both sectarian and nonsectarian, have a long distinguished history in the United States of providing quality education. Like its public sector counterpart, nonpublic education lives under the ever-present shadow of potential law suits. Although it is not possible in a monograph of this length to consider all the legal problems concerning nonpublic schools, the authors have selected problem areas that have generated substantial litigation and frequent questions from nonpublic school administrators and faculty.

For the sake of convenience, the term nonpublic has been used throughout this monograph to refer to both sectarian and nonsectarian private schools. Normally the law makes little distinction between sectarian and nonsectarian schools but where a unique legal distinction does exist, such as in free exercise of religion claims, the differences are discussed.

The editor wishes to acknowledged the tireless and capable secretarial services of Mrs. Rhonda Bowen and Mrs. Melinda Wilson whose efficient energies assured that the original manuscripts were completed on time. In addition, a special note of appreciation is owed to Mr. Darel Semler and Mr. Tom Jones of NOLPE who furnished valuable editing assistance.

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Steven P. Permuth, Co-Author

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1

Tort Liability

Charitable Immunity

The trend since World War II in most states has been the total or partial abrogation of charitable immunity.[1] Charitable immunity protected not only groups rendering charity but nonprofit service organizations generally, such as hospitals, churches and schools and colleges. The reason for abolition of total charitable immunity in most states have generally been twofold: (1) Charities are no longer low-budget, marginal operations but are large operations with hundreds or thousands of employees;[2] (2) the risk of crippling verdicts can be minimized and controlled through the purchase of liability insurance.[3]

Regardless of any statute conferring partial or complete immunity, courts have tended to consider the doctrine of charitable immunity as a judicial creation originally and thus subject to abolition by state courts when persuaded that public policy would demand such abolition.[4]

Notwithstanding the existence of a viable defense of charitable immunity in a state in the past, courts have demonstrated great imagination in circumventing the defense to find assets to satisfy a tort judgment, namely waiver of exemption,[5] a business enterprise beyond the statutory nonprofit purposes,[6] property held by the charitable institution but subject to property taxes[7] and liability to the extent of liability insurance coverage.[8] The abiding lesson from a study of the erosion and

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1. *See* Canon & Jaros, *The Impact of Changes in Judicial Doctrine: The Abrogation of Charitable Immunity*, 13 LAW & SOC'Y REV. 969, 973 (1979-1980).

2. Foster v. Roman Catholic Diocese of Vermont, 70 A.2d 230 (Vt. 1950); Adkins v. St. Francis Hosp., 143 S.E.2d 154 (W. Va. 1965); Parker v. Port Huron Hosp., 105 N.W.2d 1 (Mich. 1960).

3. Mississippi Baptist Hosp. v. Holmes, 55 So. 2d 142 (Miss. 1951); Darling v. Charleston Commun. Memorial Hosp., 211 N.E.2d 253 (Ill. 1965); Myers v. Drozda, 141 N.W.2d 852 (Neb. 1966).

4. Hungerford v. Portland Sanitarium and Benevolent Ass'n, 384 P.2d 1009 (Or. 1963); Pierce v. Yakima Valley Memorial Hosp. Ass'n, 260 P.2d 765 (Wash. 1953); Roman Catholic Church v. Kennan, 243 P.2d 455 (Ariz. 1955).

5. Brown v. City of Pittsburgh, 186 A.2d 399 (Pa. 1962).

6. Kirby v. Columbian Inst., 243 A.2d 853 (N.J. Super. Ct. App. Div. 1968).

7. Baptist Memorial Hosp. v. Couillens, 140 S.W.2d 1088 (Tenn. 1940).

8. Fairall v. Sisters of the Third Order of St. Francis, 187 N.E.2d 15 (Ill. App. Ct. 1962); Cox v. De Jarnette, 123 S.E.2d 16 (Ga. Ct. App. 1961). In an interesting conflict of

abolition of charitable immunity is that the doctrine can be suddenly invalidated with potentially disastrous results for the charitable institution. It is thus no surprise to find courts encouraging the purchase of liability insurance.[9]

In today's litigious society it is probably not advisable for a private school not to have liability insurance. The amount of such coverage is a frequently asked question and the dollar amount will depend on a variety of factors: the age group serviced; total number of students; extent and state of repair of facilities; nature of high risk activities; kind of punishments used, especially corporal punishment; and the extent of student medical coverage.[10] Many schools have an umbrella liability coverage limit of $1,000,000 but each school should assess its own need with its school attorney and insurance representative.

Exculpatory Clauses

The responsibilities of educational institutions for the general safety of, and injuries to, students in their schools depends upon legal theories involving intentional or negligent conduct. The legal theory pursued determines the elements necessary to sustain the burden of producing evidence to avoid dismissal of a complaint or summary judgment for defendant school and school personnel.[11] With the exception of the doctrine of sovereign immunity which prohibits totally or partially a state being sued in its own state courts,[12] the legal duties expected of,

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laws case, a federal appeals court has affirmed the reduction from $155,000 to $20,00 the judgment against a religious association because a Massachusetts statute provides that charitable institutions tort liability "shall not exceed the sum of twenty thousand dollars." Mason v. Southern New England Conference Ass'n of Seventh-Day Adventists, 696 F.2d 135 (1st Cir. 1982); MASS. GEN. LAWS ANN. ch. 231, § 85K (West Supp. 1982).

9. Ricker v. Northeastern Univ., 279 N.E.2d 671 (Mass. 1972); Mink v. University of Chicago, 460 F. Supp. 713 (N.D. Ill. 1978).

10. In his 12 years as superintendent of a large private school the author observed that parental anxieties and hostilities substantially abate when they realize the school has a comprehensive medical policy that will cover even student out-patient expenses. Such comprehensive medical coverage does not eliminate the need for liability insurance but does reduce significantly the prospect of being sued.

11. A plaintiff may fail in his complaint either because a statutory or other legal standard prohibits the lawsuit, *e.g.*, Willis v. Dade Cty. School Bd., 411 So. 2d 545 (Fla. Dist. Ct. App. 1982) (sovereign immunity), or because there were insufficient allegations or presentation of facts to meet the legal standard, *e.g.*, Charpentier v. St. Martin Parish School Bd., 411 So. 2d 717, 721 (La. Ct. App. 1982). "In any event, plaintiffs failed to prove that defendant's allegedly negligent conduct even occurred. In fact, the evidence shows that it didn't. Having failed to prove this, plaintiffs are unable to prove that any conduct and/or omission of defendant was a cause-in-fact of Gren's injuries. Third there is no need to proceed on to a determination of defendant's duty and whether that duty was breached."

12. There are only approximately eight to ten states that still recognize sovereign

and defenses available to, public schools are equally applicable to private schools. A defense unique to private schools is suggested by the contractual nature of private schools with their written applications and handbooks expressing the mutual responsibilities of the school on one side and the student/parents on the other. The extent to which private education involves an exchange of the furnishing of educational services for tuition charges, a situation not paralleled in the public schools, raises a question as to whether a private school can excuse itself in advance from tort liability by an appropriate exculpatory clause. The scarcity of cases in this area indicates the difficulty in relying upon release language to eliminate or restrict legal responsibility in advance for injuries to students or school personnel. Many courts consider releases of possible future legal liability to be violative of public policy.[13] In a recent case a Georgia appeals court held that consent forms signed by adults to receive reduced cost dental care from a university hospital were violations of public policy because the hospital holds itself out as willing to perform a service and the purchaser is subject to the institution's superior bargaining power.[14] Whether the court's holding applies to educational institution is unclear since the court's conclusion is predicated upon a finding that a profession (denistry) is involved and a profession is governed by whether members "will be permitted to retreat behind the protective shield of an exculpatory clause."[15]

However, in a recent Louisiana case involving a Catholic school for retarded children a release signed by parents was broad enough under Louisana law to cover any negligent breach of quasi-contract by the school.[16] In that case the parents had alleged failure of the school to secure adequate medical services which resulted in the child's comatose condition. Upon admission of the child to the school the parents had signed an application releasing the school "from any and all liability of

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immunity as a total defense. *See* E. CONNORS, EDUCATIONAL TORT LIABILITY AND MALPRACTICE 13 (1981). Although not existing as a total defense in most states sovereign immunity continues to immunize governmental agencies when the alleged misconduct is a "governmental function," a "discretionary act," an act outside the scope of the agent's employment or is accomplished with a malicious purpose or any dollar amount above a certain statutory limit. *E.g.*, MICH. COMP. LAWS ANN. § 691.1407; MICH. STAT. ANN. § 3.996(107); MINN. STAT. ANN. § 466.01, 466.04; FLA. STAT. ANN. § 768.28 (West 1979).

13. RESTATEMENT OF CONTRACTS SECOND § 512; WILLISTON ON CONTRACTS, § 1750A (3d ed. 1961).

14. Porubiansky v. Emory Univ., 275 S.E.2d 163 (Ga. Ct. App. 1980).

15. *Id.* at 169. The court based its reasoning upon the fact that lawyers in Georgia cannot limit their liability with exculpatory clauses and therefore the medical profession should likewise be so affected. Georgia State Bar, *Code of Professional Responsibility* Rule 3-106; EC 6-6. Whether teaching is a profession is unclear.

16. Batting v. Hartford Accident and Indemn. Co., 482 F. Supp. 338 (W.D. La. 1977), *aff'd* 608 F.2d 119 (5th Cir. 1979).

every nature, kind and description as a result of any injuries, hurt or damage sustained by the child herein described." Since the parents chose to sue on a theory of breach of contract authorizing the school to secure emergency medical assistance for the child it is difficult to predict what the outcome of the case would have been had the legal theory for recovery been negligence rather than quasi contract. A recent New York court[17] addressed the question of an action in negligence where a contract exculpatory clause was involved. The student injured in a parachute landing as part of a course offered by a private parachuting school was not barred from bringing an action in negligence despite a "release and hold harmless" provision signed by the plaintiff absolving the operators and instructors "of and from any and all manner of actions" by reason of student's participation in the flying and parachute jumping activities. The court did not prohibit the use of exculpatory clauses but did observe that to effectively absolve the school from liability for its negligent acts the release would have to plainly and precisely state that the limitation of liability extended to the school's negligence, fault or carelessness, and such clarity and precision was not conveyed through the release signed by plaintiff. An earlier New York case,[18] also involving a private parachute jumping school, had reached a similar result. In that case the plaintiff alleged that his injuries resulting from a jump exacerbated a prior medical condition that would have been apparent to the instructor had he required a medical certificate pursuant to FAA rules. The New York court noted that an advance release form could be valid, but the general release form signed by plaintiff was not an adequate defense because it did not specifically waive the failure by the teacher to instruct and the failure of the teacher to comply with FAA rules.

In general even where advance releases are not considered violations of public policy an advance release will not be a defense against an action in negligence. In a humorous New York case[19] an advance release signed by a high school faculty member who was having her car repaired in the school's auto mechanics shop did not prohibit her negligence claim where her car falling off the lift could not have occurred in the absence of adequate teacher supervision.

Reliance upon exculpatory clauses in applications, handbooks or field-trip forms as a defense in negligence actions is ill-advised. There are at least three levels of legal problems facing a school which considers advance releases to be an adequate defense against negligence

17. Sivaslian v. Rawlins, 451 N.Y.S.2d 307 (N.Y. App. Div. 1982).
18. Gross v. Sweet, 407 N.Y.S.2d 254 (N.Y. App. Div. 1978).
19. Steffen v. Baker, 387 N.Y.S.2d 355 (N.Y. City Ct. of New Rochelle 1976).

actions. The threshold problem is determining whether the state in which the school is located considers advance releases to be a violation of public policy. Such a judicial or legislative determination would not make the use of exculpatory language illegal but it would make the advance release unenforceable as a defense.[20] Even if advance releases are not violative of public policy a second problem would be drafting exculpatory provisions which address specific bases of negligence claims, *e.g.*, failure to adequately supervise on school premises, lack of instruction in safety procedures in industrial arts classes, failure to make rules reasonably necessary to protect students in a school or classroom. Assuming that a private school were able to draft exculpatory language specific enough to satisfy courts such as those referred to earlier,[21] the school must face some substantial policy questions: Whether an educational institution that absolves itself of all responsibility for the care and protection of students on its premises can still be considered to be a "school"; whether such exculpatory language projects an unfavorable image regarding the function and purpose of the school; whether competition among private schools for students will result in some form of negotiation with parents regarding degrees of exculpation. Assuming that exculpatory language could be drafted to satisfy judicial expectations, there is yet a third level of policy concern, namely informed consent. There is no clear judicial declaration regarding the application of informed consent to exculpatory situations in an educational context. The extensive application of informed consent to schools in a variety of other areas[22] would seem to suggest its application also in the area of tort liability.[23] Even if a parent knowingly waived his or her causes of action by signing a document with an exculpatory provision it seems highly improbable that such a waiver would apply to a minor child.[24]

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20. *See supra*, note 14.

21. *See supra* notes 7-9 and accompanying text.

22. *E.g.*, 45 C.F.R. § 46.103(c) published to interpret the Federal Privacy Act defines "informed consent" as "the knowing consent of an individual or his legally authorized representative so situated as to be able to exercise free power of choice without undue inducement or any element of force, fraud, deceit, duress or other form of constraint or coercion." For an application of informed consent as it applies to school research, *see* Merriken v. Cressman, 465 F. Supp. 913 (E.D. Pa. 1973). For an application of informed consent to discipline situations, *see* R. PHAY, THE LAW OF PROCEDURE IN STUDENT SUSPENSIONS AND EXPULSIONS 11-12 (NOLPE Monograph 1977) and S. PERMUTH, THE PRINCIPAL, THE LAW AND STUDENT DISCIPLINE 15-17 (Ill. Principals Ass'n, n.d.).

23. This appears to be the position in J. MIRZA & J. APPLEMAN, ILLINOIS TORT LAW AND PRACTICE 474, 476-77 (Lawyers Co-op. Pub. Co., 1974).

24. Where minors are involved some states have rules that require judicial approval of any release before it is binding on a minor. *See* Shine v. Wabash R.R. Co., 132 N.E.2d 41 (Ill. 1956); Valdimer v. Mt. Vernon Hebrew Camps, Inc., 172 N.E.2d 283 (N.Y. 1961). It would seem logical that the public policy behind a judicial rule applicable to releases *after* an event would be even stronger when applied to releases signed *prior to* an event.

It would be advisable if exculpatory clauses are used that private schools focus upon eliminating egregious instructional and supervisory problems which form the factual basis for negligence actions.

Legal Requirements

The requirements to support a negligence action when a private school is a defendant are the same as in the case when a public school is a defendant. The first requirement is a recognizable legal duty.[25] There appear to be at least five recognized legal duties: to utilize competent and proficient personnel;[26] to adequately supervise;[27] to adequately instruct;[28] to furnish and maintain safe equipment and safe premises;[29] and to make and enforce adequate rules.[30]

The second requirement is a breach of a recognized legal duty. The determination of a breach is measured by the reasonable man standard coupled with the concept of foreseeability. Four elements of the hypothetical reasonable man have been described as "intelligence, physical attributes, perception and memory, and special skills."[31] While the average school official is assumed to be of average intelligence,[32] it is important to note that a similar assumption can also

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25. The parameters of the term "duty" are determined by what is perceived to be socially acceptable conduct. The standard for what is socially acceptable can be determined by a court or by the legislature. The recent litigation involving educational malpractice is a classic illustration of judicial refusal to impose a duty to educate upon public schools, but rather leave the creation of such a duty to the legislature. Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814 (Cal. Ct. App. 1976); Smith v. Alameda Cty. Social Servs. Agency, 90 Cal. App. 3d 929 (Cal. Ct. App. 1979). For similar policy reasons courts have refused to create such a duty for private schools. Pietra v. St. Joseph's School, 48 U.S.L.W. 2229 (N.Y. Sup. Ct. 1979).

26. O'Brien v. Township High School Dist. No. 214, 392 N.E.2d 615 (Ill. App. Ct. 1979) (an attempted treatment of athlete by a student); Nickley v. Skemp, 239 N.W. 426 (Wis. 1930) (failure of unlicensed nurse interns to recognize symptons); Garber v. Central H.S. Dist., 251 App. Div. 214 (N.Y. App. Div. 1937) (janitor supervising non-time gym activities).

27. Smith v. Archbishop of St. Louis, 632 S.W.2d 516 (Mo. Ct. App. 1982) (classroom injury); Lamy v. Commercial Union Insurance Co., 277 N.W.2d 821 (Wis. 1979) (restroom injury).

28. Potter v. North Carolina School of the Arts, 245 S.E.2d 188 (N.C. 1978) (instruction on equipment operation); County of Riverside v. Loma Linda Univ., 173 Cal. Rptr. 371 (Cal. Ct. App. 1981) (instruction of medical residents).

29. Bush v. Oscoda Area Schools, 250 N.W.2d 759 (Wis. 1977) (unsafe classroom); Knight v. City of Philadelphia, 445 A.2d 778 (Pa. Super. Ct. 1982) (unsafe equipment).

30. Matteucci v. High School Dist. No. 208, 281 N.E.2d 383 (Ill. App. Ct. 1972) (failure to enforce rules); Lynch v. Board of Educ. of Collinsville, 390 N.E.2d 526 (Ill. App. Ct. 1979) (failure to make and enforce rules).

31. CONNORS, *supra* note 12.

32. *E.g.*, Green v. Orleans Parish School Bd., 365 So. 2d 834 (La. 1979) where a teacher's "reasonable man" intelligence was reinforced by expert witnesses.

be made as a defense in a negligence action, namely, that a student has the average intelligence of a person of his age and maturity. Thus a seriously burned student in a science laboratory experiment could not recover damages from a classroom teacher even though the trial court observed that the students involved "were not the brightest."[33] The fact that the students were average or below average intelligence and bored with the experiment could not excuse their conduct which did not "conform to that which would be expected of a similarly situated child of the same age and with the same capacity, discretion, knowledge and experience in creating the initial fire." Physical attributes can be a factor in excusing a female teacher from liability for leaving the room to find help rather than try to stop a fight between two larger male students,[34] but unnecessary physical contact with a student by a teacher who is heavier and taller can warrant the assessment of damages against the teacher.[35] The area of perception and memory can be highly subjective but some problem areas might be in the use of a student teacher as a substitute teacher,[36] changing the standard rules of a game,[37] injuries resulting from racial unrest,[38] awareness of student conflicts,[39] deviations from curriculum guides,[40] supervision of retarded students,[41] and dangerous premises discoverable upon examination.[42] School officials are expected to "be alert to conditions which may be dangerous to participants, such as rowdyism, defective premises, lack of use of protective devices or safety equipment, and the age-skill experience of the participants in relation to the assumption of risks."[43] The final area of the reasonable man, special skills, refers not only to special skills which a faculty member has and can reasonably be expected to communicate to students[44] but also to special skills possessed by a student thus absolving or mitigating a faculty member's

33. Rixmann v. Somerset Public Schools, 266 N.W.2d 326 (Wis. 1978). The Wisconsin Supreme Court's complete reversal of a $33,400.00 judgment for plaintiff student against defendant teacher and school district is remarkable because Wisconsin is a comparative negligence state.
34. Kim v. State of Hawaii, 616 P.2d 1376 (Hawaii 1980).
35. Thomas v. Bedford, 389 So. 2d 405 (La. Ct. App. 1980).
36. Brahatcek v. Millard School Dist. No. 17, 273 N.W.2d 680 (Neb. 1979).
37. Sutphen v. Benthian, 397 A.2d 709 (N.J. 1979).
38. Raleigh v. Indiana School Dist. No. 625, 275 N.W.2d 572 (Minn. 1978).
39. Gammon v. Edwardsville Commun. Unit School Dist. No. 7, 403 N.E.2d 43 (Ill. App. Ct. 1980).
40. Larson v. Indiana School Dist. No. 314, 289 N.W.2d 112 (Minn. 1980).
41. Foster v. Houston General Insurance Co., 407 So. 2d 759 (La. Ct. App. 1981).
42. Ardoin v. Evangeline Parish School, 376 So. 2d 372 (La. 1979).
43. H. HUDGINS, JR. & R. VACCA, LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS 79 (The Michie Co. 1979).
44. Potter v. North Carolina School of the Arts, 245 S.E.2d 188 (N.C. 1978) (operation of fog machine).

responsibility to instruct or supervise.[45] Whether a skill is in fact "special" and thus deserving of particular instruction may be the pivotal point in determining liability. Student paralysis resulting from a student's arching his back during a 30 second physical education class wrestling drill did not generate liability because a student arches his back naturally without having to be taught.[46] However, normally the assembling or operation of equipment by students assumes that students must be instructed in order to acquire the requisite skills.[47]

The reasonable man in an attempt to construct an objective standard as to whether a person with the same duties (teacher, administrator, coach) working with the same clientele (varying age levels) under similar circumstances (classroom, field trip, day camp) would have acted the same way. But the reasonable man is assumed to be imbued with a degree of foreseeability regarding the effects of his conduct. The issue of foreseeability is determined by "the age, relationship, and physical characteristics of the parties involved; the gravity and probability of danger presented; and the necessity and utility of the actor's conduct."[48] Foreseeability also has a time and space dimension to it and is related both to breach of duty and the third legal requirement proximate cause; there must be a reasonable relationship between the act and its effects as determined by whether the mythical reasonable man could reasonably have anticipated the effects of his actions. To eliminate this aspect of foreseeability is to move into the area of strict liability where a breach of a duty itself generates liability.[49]

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45. Miles v. School Dist. No. 138, 281 N.W.2d 396 (Neb. 1979) (prior experience with jointer).

46. Green v. Orleans Parish School Bd., 365 So. 2d 834 (La. 1979).

47. Miller v. Macalester College, 115 N.W.2d 666 (Minn. 1962) (assembling equipment); Brittan v. State, 103 N.Y.S.2d 485 (N.Y. 1951) (operation of equipment).

48. W. VALENTE, LAW IN THE SCHOOLS 350 (Merrill Pub. Co. 1980).

49. Strict liability has been imposed by courts and legislatures upon a variety of actions, such as vibrations resulting from pile driving in Caparole v. C.W. Blakeslee & Sons, Inc., 175 A.2d 561 (Conn. 1961) (storage and use of explosives); Peet v. Dolese & Shepard Co., 190 N.E.2d 613 (Ill. App. Ct. 1963) (excavations); Proud v. W.S. Bills & Sons, Inc., 255 N.E.2d 64 (Ill. App. Ct. 1970); ILL. REV. STAT. ch. 17½, § 51. The most frequently litigated area of strict liability affecting education involves Worker's Compensation. Statutory interpretations form the basis of this area with the most frequently litigated areas being a determination of causal connection between employment and injury, Warthen v. Southeast Oklahoma State Univ., 641 P.2d 1125 (Okla. Ct. App. 1981) (inclusion of injury within the statute); Lockwood v. Independent School Dist. No. 877, 312 N.W.2d 924 (Minn. 1981) (amount of recovery); Davis v. New York City Bd. of Educ., 445 N.Y.S.2d 626 (N.Y. App. Div. 1981); Board of Educ. of City of Chicago v. Chicago Teachers Union, Local No. 1, 427 N.E.2d 1199 (Ill. 1981). A recent case raised an intriguing question regarding who is an employee of an educational institution for purposes of Worker's Compensation. Rensing v. Indiana State Univ. Bd. of Trustees, 437 N.W.2d 78 (Ind. Ct. App. 1982) *rev'd*, 444 N.E.2d 1170 (Ind. 1983) (financial aid agreement between varsity football player and university established employer-employee relationship).

A recent case, *Kingsley v. Indiana School Dist., Hill City*[50] represents the problems of addressing the question of foreseeability without appearing to create strict liability. In *Kingsley*, a high school student and her mother had complained on several occasions that the girl's coat had been taken from a hook on the third floor and thrown on top of some lockers. The lockers in question were 6'5½" tall and 18" deep and were located near the principal's office. Apparently a shortage of locker space required that some students hang their coats on hooks in the hall. Upon observing her coat upon the lockers again the plaintiff decided to retrieve it herself. She stepped on the locking device of the locker, grabbed the coat and in pulling it from the top of the locker caught her ring on a 1/16" protrusion on the top of the locker and scraped all skin and underlying tissues from her finger leaving only the muscle and bone.

Evidence relied upon by the court in finding defendant school district negligent for failing to adequately supervise its premises was as follows:

(1) Cross-examination of the school janitor who testified that a day or two before the trial he examined the top of the locker and found a 1/16" protrusion on which his finger caught when he passed his finger over the surface.[51]
(2) Pictures taken at the time of trial offered by defendant showing strings from a dusting mop snared on the protrusion.[52]
(3) Repeated throwing of coats on top of lockers contrary to school rules.[53]
(4) Insufficient number of hangers on which to hang coats.[54]
(5) Repeated complaints by plaintiff to the principal.[55]
(6) Testimony by a student who removed what remained of plaintiff's finger from the top of the locker where the protrusion existed.[56]

Without attempting to diminish the tragic nature of the facts in *Kingsley* the implications of the courts understanding of foreseeability should cause concern to administrators, at least in Minnesota. Granted that school officials have a duty to inspect their premises but should there not be some relationship between the place of injury and the probability of student contact with that place? The top of a six-and-one-half-foot locker would normally not be considered to be a place with which students would have contact. If a duty to inspect the top of lockers is

50. 251 N.W.2d 634 (Minn. 1977).
51. *Id.* at 635.
52. *Id.*
53. *Id.* at 635, 636.
54. *Id.* at 635.
55. *Id.*
56. *Id.* at 636.

created by the presence of coats thrown upon the lockers, does the mere presence of those coats generate liability for *any* injuries resulting from *any* defects regardless how minor the defect and how improbable the likelihood of injury? To require of school officials a duty to discover and correct *any* defect would appear to obliterate the traditional understanding of foreseeability; schools have neither the time nor the funds to correct defects such as a 1/16" protrusion on the top of a locker 6½' from the floor. To the extent that the *Kingsley* court relied upon the lack of enforcement of the school rule prohibiting throwing coats upon the lockers, one can only wonder whether it would be better not to have made the rule at all. And in a more general vein would it be advisable to only enact rules that can be totally enforced? But one can only conjecture that had the principal not made a rule prohibiting the throwing of coats on the lockers whether the absence of a rule would have been used by the court as the breached duty. Is *Kingsley* suggesting that injuries related to the lack of effective enforcement of a school rule creates a form of strict liability? The prospects of such a possibility are indeed frightening.[57]

The third legal requirement in a negligence action is proximate cause between the alleged breach of duty and injury. Proximate cause is a sequential connection between breach and injury "closely related in time, space or order."[58] It is perhaps easiest to explain proximate cause by what it is not. It is quite possible to have a duty, breach of duty and injury without having proximate cause. Such a possibility is illustrated by a recent tragic Mississippi case.[59] In that case a thirteen-year-old girl who had skipped out of school between classes was later found floating in a river stabbed in the back. The school had a procedure whereby each teacher at the beginning of each class period would report any variations from the absence list circulated at the beginning of each school day. One teacher failed to do so and thus the deceased student's absence was not detected until later in the day. The Mississippi Supreme Court refused to hold that failure to report an unauthorized absence had any causal connection with the tragic death of the student. It is noteworthy that the court did not rely upon the concept of

57. The Kingsley standard of foreseeability was sustained in Raleigh v. Indiana School Dist. No. 625, 275 N.W.2d 572 (Minn. 1978). The jury instruction on foreseeability in Raleigh was as follows: "It is the duty of a school to use ordinary care and to protect its students from injury resulting from the conduct of other students under circumstances where such conduct would reasonably have been foreseen and could have been prevented by the use of ordinary care. There is no requirement of constant supervision of all the movements of all pupils at all times.

58. CONNORS, *supra* note 12.

59. Levandoski v. Jackson Cty. School Dist., 328 So. 2d 339 (Miss. 1976). *See also* Chavez v. Tolleson Elem. School Dist., 595 P.2d 1017 (Cal. 1979).

intentional intervening cause as the basis for its decision.[60] However, the duty of a school to supervise can be intensified by statute so that a causal connection can be created. In a recent California case[61] a school district was found liable where a ten-year-old summer school student left school before classes were dismissed for the day and was seriously injured at an intersection when struck by a motorcycle. The court relied upon a California statute which imposed on its school the duty to "supervise at all times the conduct of the children on school grounds." This statutory provision along with a school rule that students could not leave school without the principal's approval appeared to create for the principal a higher degree of care to enforce that rule.[62]

The fourth legal requirement in a negligence action is that of injury.[63] The injury must be real rather than imagined[64] and courts are generally reluctant to award damages where there is not some form of physical contact or injury.[65] Injuries do not need to be substantial in order for a plaintiff to recover. In *Thomas v. Bedford*[66] damages of $500 were awarded by an appellate court to a student against a classroom teacher after the trial court had found in the teacher's favor. The teacher had given a 14-year-old student a "severe shaking" because the student earlier in the day had shot the teacher in the face with a rubber band. The presence of minor contusions on the student's chest, arm and back demonstrated to the appeals court that the teacher's conduct was less than reasonable. Mere embarrassment by a child because of classroom discipline such as isolating the student, having the student stand or sit in a corner or having the student sing or recite in front of the class would not be compensable. However, teacher conduct which

60. For an interesting case relying upon intervening cause to absolve a teacher of liability for a student's eye injury resulting from a pencil thrown by another student despite the teacher's one hour and fifteen minute absence from the room, *see* Ohman v. Board of Educ. of City of N.Y., 90 N.E.2d 474 (N.Y. 1949).

61. Loyem v. Manhattan Beach City School Dist., 585 P.2d 851 (Cal. 1978).

62. The court indicated that the principal was held only to a degree of care "which a person of ordinary prudence, charged with comparable duties would exercise under the circumstances" but clearly the degree of "ordinary prudence" is higher than in Mississippi.

63. At least one state, Illinois, protects the right to recover for wrongs by declaring in article I, section 12 of its constitution: "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely and promptly."

64. Although not a tort lawsuit as such, an illustration of a specious action occurred recently in Pittsylvania County, Virginia where the parents of four second grade students sought damages and injunctive relief from the school district because their four children were among the 22 out of 23 who were not promoted to third grade due to the fact that they had failed to demonstrate the requisite level in the Ginn Reading Series. The case was dismissed as beyond the court's expertise. Sandlin v. Johnson, 643 F.2d 1027 (4th Cir. 1981).

65. *See* Benza v. Shulman Air Freight, 361 N.E.2d 91 (Ill. App. Ct. 1977).

66. 389 So. 2d 405 (La. Ct. App. 1980).

is "outrageous" or "beyond all possible bounds of decency" could be the basis for a tort claim of intentional infliction of emotional distress, if that cause or action is recognized in a particular jurisdiction.[67]

Self-Defense and Restraint

Thre are few legal areas that appear to generate greater concern by citizens in general and educators in particular than the subject of self-defense. Certainly it is an area about which there is considerable confusion regarding what the law permits a person to do in defending his own person. School personnel are generally concerned about what measures they can take in defending themselves if assaulted by a student or what measures they can take in breaking up school fights. The dearth of reported cases in use of self-defense in education indicates fortunately that either school personnel exercise admirable self-control or situations in which students are injured as a result of faculty self-defense do not result in student lawsuits against faculty members. The subject of self-defense raises three key questions: deadly force, retreat, and retaliation.

The term "deadly force" in self-defense does not necessarily denote that someone died but rather power in action, whether or not an instrumentality is used, which could, although does not necessarily, produce death.[68] The amount of force that can be used in a school setting depends upont he age of the pupil, the nature of the attacker's action necessitating defense, and the action of the one attacked after the initial attack has ceased. The essential elements of self-defense are that a person does not provoke the difficulty and that there must be an impending peril without a convenient or reasonable means of escape.[69] The recommended policy of retreating from impending bodily harm before responding with deadly force may make sense in many social settings but it is hardly applicable in a school setting where teachers and administrators have a legal duty to supervise students.[70] Some states such as Minnesota have codified the use of reasonable force to encourage the exercise of that duty.

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67. *See* Galvin v. Gallagher, 401 N.E.2d 1243 (Ill. App. Ct. 1980). Humiliation is not sufficient to invoke a remedy under the tort theory, Irving v. J.L. Marsh, Inc., 360 N.E.2d 983 (Ill. App. Ct. 1977).

68. *Cf.* BLACK'S LAW DICTIONARY 773 (4th ed. 1951).

69. *Cf.* Hayes v. State, 142 So. 675, 677 (Ala. 1930).

70. Failure of a teacher to intervene to protect a student assaulted by another student can be the basis of a tort claim, Kim v. State of Hawaii, 616 P.2d 1376 (Hawaii 1980) as well as a school official's failure to anticipate confrontations between students, Collins v. Wilson, 331 So. 2d 603 (La. 1976); Gammon v. Edwardsville Commun. Unit School Dist. No. 7, 403 N.E.2d 43 (Ill. App. Ct. 1980).

> Reasonable force may be used upon or toward the person of another . . . when used by a parent, guardian or teacher . . . in the exercise of lawful authority to restrain or correct such child or pupil.[71]

In a violent age when students may be using weapons that are lifethreatening, the general rule is that defensive force may be used commensurate with the force of the attacker.[72] In order to justify the use of force on the ground of self-defense, it is not required to show that the use of force was necessary to protect from imminent personal injury. It is sufficient if the necessity was real or apparent. But the mere belief of the persons attacked is not sufficient to justify the use of force.[73]

In other than self-defense situations, the possible harm to students who are fighting, as well as to spectators, demands that a school official take some affirmative actions in separating the students. On a linear spectrum that action may range from using a voice command to the antagonists to using physical force toward one or both of the students. It would be reasonable for school personnel to physically separte the students by holding them or even physically pushing them apart but there is no need for any school official to jeopardize his own physical safety or to wait until he is struck before responding with force.[74] However, it is not reasonable for a teacher to become an agressor toward one of the fighting students or toward a student who first assaults him. Once belligerents are separated or an attacker is disarmed or otherwise neutralized, the reasonable justification for the use of physical force is gone. The existence of a discernible line between defense and aggression is a well-accepted rule.[75] Likewise the long-standing common law rule is that a person coming to the defense of another steps into the shoes of the person he is assisting is probably generally accepted.[76]

As long as school personnel address themselves to physically separating fighting students or to resisting student attackers with the least force necessary, there should be no legal liability for injuries to the students. Likewise there should be no reason why a student antagonist could not be held and conducted to the office if he refuses to go. It

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71. MINN. STAT. ANN. § 609.06 (1980).
72. *See generally* S. PERMUTH, R. MAWDSLEY & J. DALY, THE LAW, THE STUDENT AND THE CATHOLIC SCHOOL 48 (1981).
73. Germolus v. Sausser, 85 N.W. 946 (Minn. 1901); Boston v. Muncy, 233 P.2d 300 (Okla. 1951).
74. Andreozzi v. Rubano, 141 A.2d 639 (Conn. 1958).
75. Germolus, *supra* note 73.
76. *See* Minnesota v. Merdina, 25 Minn. 161 (1878).

would be far preferable to hold onto an antagonist if there is a question that he represents a threat to himself or others rather than release the student too soon with serious injury done to someone else by that student.[77]

Field Trips

Field trips are troublesome legal problem areas for educators because normal school responsibilities are exacerbated by new ones, such as heightened supervision due to the nature of the place visited or potential problems attendant to transporting the students. Field trips involve four areas with potential legal implications: instructions, supervision, transportation and emergencies.

Even though it is doubtful that a school can exculpate its legal liability by using the standard field trip forms,[78] such forms could be altered to be made into information instruments. Field trip forms should focus upon furnishing as much information as possible to the parent or guardian signing the form rather than using the form to attempt to hold the school harmless in cases of negligence. A good field trip form should contain in sufficient detail the following kinds of information: description of the trip to be taken; objectives of the field trip; specific items to be brought by the student; and instructions that need to be given to the child by *both* the teacher and the parent.[79] It would seem that of special importance to any parent or guardian would be any dangerous conditions likely to be encountered and special rules addressing the anticipated dangers.

The pivotal aspect of any field trip is undoubtedly the nature of supervision provided. Supervision includes not only the responsibility by adults on the trip toward the students but the responsibility of the person in charge of the field trip to adequately instruct those adults doing the supervising. The number of adults to accompany a field trip is a variable depending upon the mental age of the students or other circumstances that would demand more adults. In *Foster v. Houston General Insurance Co.*[80] one adult teacher accompanying eleven retarded students from a school to a gymnasium three blocks away was considered inadequate when a student was struck by a car and killed

77. The rule appears to be well established that failure to reasonably pursue a duty once some initial action has been taken is the basis of a tort claim. *See* Black v. New York, 79 N.E. 797 (Mass. 1907); Zelenko v. Gimbel Bros., 287 N.Y.S. 134 (N.Y. Sup. Ct. 1935); Hoyem v. Manhattan Beach City School Dist., 585 P.2d 851 (Cal. 1978).

78. *See, supra* notes 3-14 and accompanying text.

79. A sample field trip form can be found *supra* note 72 at 16.

80. 407 So. 2d 759 (La. Ct. App. 1981).

when crossing a street. In *Foster* two teachers were scheduled to accompany the students but one teacher was unable to leave because she was teaching a class and so the other teacher was told to go on ahead. A total judgment of $65,000 for the student's death was directed against the two teachers only and not against the school district because of the teachers' failure to provide an adequate number of supervisory personnel. The *Foster* court did not indicate what constituted a satisfactory teacher-student ratio but did state that the students should have been interspersed among the teachers with at least one teacher available to stand in the street to be crossed and halt traffic. In *Raleigh v. Independent School District No. 625*[81] the St. Paul, Minnesota school district sponsored the bussing of 1200 high school students to a movie theater for the showing of the film "King" as part of Afro-American History Week. The school district superintendent required a teacher-pupil ratio of 1:35. At the time of the field trip there had been racial tension at one of the St. Paul high schools. After the film, as students were departing the theater, a white student had her purse stolen and her arm slashed. The *Raleigh* court in upholding a verdict against the school district noted that the district is not liable for sudden, unanticipated misconduct of fellow students but it is liable for sudden foreseeable misconduct which probably would have been prevented had a teacher been present. School district liability was based upon the knowledge of a racial tension plus lack of supervision and organization at the theater.

Liability problems can also be encountered in field trip situations where special training should have been provided in anticipation of potential dangers. In the leading case of *Cox v. Barnes*[82] an 18-year-old high school senior drowned at a beach while on a one-day senior outing. Prior to approving the field trip the school principal told the seniors that swimming would be permitted only if they furnished their own lifeguard. They asked the physical education director who was an excellent swimmer to accompany them, which he did. The student drowned while attempting to swim toward a diving tank approximately 40 yards from shore on which was attached a sign "Off Limits". The alleged acts of negligence by the two adults accompanying the field trip were as follows: permitting students to enter the water within one hour after lunch, violation of signs regarding swimming at one's risk, failure to check water conditions, permitting students to swim in cold water in street clothes, failure to have lifesaving equipment available, and failure to sit in the lifesaving stands. The court refused to find

81. 275 N.W.2d 572 (Minn. 1978).
82. 469 S.W.2d 61 (Ky. 1971).

the teachers or school district liable but undoubtedly the requirement by the principal that a lifeguard accompany the field trip was a deciding factor. In addition the age of the students was a factor because an 18-year-old was considered old enough to read and obey signs. A similar result was reached in *Morrison v. Community Unit School District No. 1*[83] where a 15-year-old student drowned in a swimming pool. Courts appear willing to find that the older the students the more likely students should appreciate risks associated with certain activities and thus the less direct supervision that is necessary.[84] Where students on field trips are injured or killed by the intentional acts of another person, whether or not a student appears to be immaterial, the courts seem to be willing to find school personnel and the schools themselves not liable because of the intervening intentional cause.[85]

Whether the owners of the situs of the field are liable for injuries to students on field trips often depends upon whether the students are considered to be licensees or invitees. Most usually school personnel request permission to visit a place and thus students are considered to be licensees with the situs owner responsible only to warn or make safe dangerous conditions known to him.[86] However if the students are present at a situs at the invitation of the owner the duty of the owner is to warn or make safe dangerous conditions known of or that he should have known of.[87] In an interesting recent case even former students can be invitees when returning to their school. In *School Board of Palm Beach v. Anderson*[88] a former student who was killed when he returned to get his records generated liability for the school. The presence of the student in the building for a legitimate function plus knowledge of racial disturbances in the school were sufficient notice to school officials to keep the premises safe. As a result of the licensee-invitee distinction it would be better for students to be invited to the situs of the field trip but as a practical matter most field trips would never take place if schools waited for invitations. Thus the most effective supervisory strategy is proper

83. 358 N.E.2d 389 (Ill. App. Ct. 1976).

84. Moore v. Drummet, 478 S.W.2d 177 (Tex. Civ. App. 1972) (15-year-old falling off horse); Arnold v. Hafling, 474 P.2d 638 (Colo. 1970) (high school student pushed by another student).

85. Mancha v. Field Museum of Natural History, 283 N.E.2d 899 (Ill. App. Ct. 1972); Sharp v. Fairbanks North Star Borough, 569 P.2d 178 (Alas. 1971).

86. HUDGINS & VACCA, *supra* note 43 at 88; CONNORS, *supra* note 12 at 56.

87. In Nunez v. Isidore Newman H.S., 306 So. 2d 475 (La. App. 1975) the invitee standard is stated: "An owner or occupier of lands or buildings must take reasonable and ordinary care to protect invitees from any dangerous conditions on the premises. He must also warn them of any latent dangerous defects in the premises and inspect the premises for any possible dangerous conditions of which he does not know."

88. 411 So. 2d 940 (Fla. Dist. Ct. App. 1982).

instruction to those participating in the field trip regarding anticipated hazards and safety rules.[89]

The problem of transporting students on field trips is a neverending source of concern to school officials. While school buses or common carriers would be preferrable such means of transportation are not always available, practical or financially feasible.[90] Where students provide their own transportation in private cars the concern for the school is whether the driver will be considered to be an agent of the school. The creation of an agency will depend upon a number of variables: whether the car was used with the permission and for the convenience of the school, whether such use was a standard school practice, whether the function for which the car was used was a sanctioned school activity and whether the school reimbursed the driver for expenses. The mere fact that students use their own cars to get to school-sponsored activities should not in itself create an agency relationship.[91] However if school transportation is provided by the school and an exception is made for one student the result can be different.[92] Even an unauthorized use of a car for a field trip can create school liability if it can be shown that the school had knowledge of the unauthorized use.[93] Because of the likelihood that high school students would prefer driving their cars to off-school activities a school should warn all drivers regarding the importance of having adequate liability insurance plus ascertaining whether there are any policy limitations on liability coverage. As often as possible schools should provide transportation and make the use of that transportation mandatory.

How schools should prepare for and handle emergencies on field trips is a subject that does not get much attention. A frequent question is what to do with the flagrantly disobedient or unruly student on a field trip. The problem is obviously exacerbated if the trip is for several days. Sending a student home should be done only as an absolute last resort and then only if the parent has consented in writing in advance to pay for the cost of such a return, if a common carrier only is used and if the parent is phoned prior to placing the student on any common carrier.

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89. Obviously the safety rules need to take into consideration the nature of the hazards plus the age of the students. As the mental age of the student decreases mere verbal instructions without adequate number of supervisory personnel are not sufficient. *See* Foster v. Houston General Ins. Co., 407 So. 2d 759 (La. Ct. App. 1981).

90. The refusal of a school to provide bus transportation should not in itself make the school liable. *See* Foster v. Houston General Ins. Co., 407 So. 2d 759 (La. Ct. App. 1981).

91. *See* Bradshaw v. Rawlings, 612 F.2d 135 (3rd Cir. 1979). *See also* Rauls v. Dugas, 398 So. 2d 630 (La. 1981) where students providing transportation to nearby town for free football physical did not generate liability.

92. Williamson v. Board of Educ. of Berne-Knox, 375 N.Y.S.2d 221 (N.Y. 1975).

93. Sumter Cty. v. Pritchett, 186 S.E.2d 798 (S.C. 1971).

The risks associated with such a problem area have unquestionably contributed to many schools prohibiting field trips which last for longer than one day. Obviously some emergencies can be anticipated and planned for. It could well be negligent for school personnel to not take a first-aid kit on a field trip, especially if the trip is to a place removed from hospitals or fire departments. First aid equipment and accompanying trained personnel need to be taken on a field trip commensurate with the nature of the trip. It would probably be negligent for school personnel not to have a trained lifeguard at a swimming activity, a snake-bite kit on a hike to a rocky or marshy area, or a stretcher, splints and an accomplished guide on a hike through mountainous terrain.

Medications

A school's responsibility for student medication has historically not been a problem area. Students were always able to carry and administer their own medications. But with the access of more handicapped students to schools and with awareness of drug abuse prompting school officials to direct medications to be kept in the office the school's responsibilities for medications has likewise changed. If a school permits students to keep and administer their own medicines then the school's responsibility should be to act reasonably toward these students as it would for any illness or injury. Basically school officials are expected to act only as reasonable and prudent persons to contact professional medical help when they receive knowledge that a student needs such attention.[94] Unless specially trained to do so school officials are not expected to go beyond administering life-saving first aid[95] but they will be liable for excessive treatment.[96] Recent litigation in the area of handicapped children has brought attention to school personnel furnishing medical services because schools covered by the Education for All Handicapped Children Act of 1975[97] or the Rehabilitation Act of 1973[98] may be required to furnish certain medical services "to assist a handicapped child to benefit from special education."[99] Whether school personnel, including school nurses, are qualified under state

94. Failure to contact emergency help can create liability. Mogabgab v. Orleans Parish School Bd., 239 So. 2d 456 (La. Ct. App. 1970); Peck v. Board of Educ. of City of Mt. Vernon, 317 N.Y.S.2d 919 (N.Y. 1970).
95. H. APPENZELLER, ATHLETICS AND THE LAW 208 (The Michie Co. 1975).
96. Welch v. Dumsmiur Joint Union H.S. Dist., 326 P.2d 663 (Cal. 1958).
97. 20 U.S.C. § 1401 (1975).
98. 29 U.S.C. § 754 (1973).
99. 20 U.S.C. § 1401 (1975).

professional codes to perform certain medical procedures apparently mandated by the federal handicapped laws is by no means clear. In two recent cases, school districts were required to provide catheterization for school children.[100] Although many private schools may not be covered by the handicapped acts it should be a concern for those which are to determine whether they can provide medical services without violating tort liability standards or state statutes punishing the unauthorized practice of medicine.[101]

If a school requires all student medications to be kept in the office while the student is in school then it would seem that the school may have a heightened responsibility. A school would normally have no responsibility to monitor the dosage or timeliness of administration of medications where the students carry the medications with them; but where the school office has control of the medications it may be incumbent upon school officials to notify students if they fail to appear at the office on time to take their medications, and possibly to even supervise the accuracy of the dosages. Although there appear to be no cases in this area it may be well for private schools to either allow students to carry their own medications along with a central office permission slip issued on a daily basis or to keep medications in the office and have parents sign a release, excusing the school from any responsibility to contact students to come to the office to take medications and to monitor dosages. Although such a narrowly drawn advance release may well be an enforceable exculpatory clause[102] it would seem that the increased risk of liability for the school is not worth a rule directing medications to be kept in the office.

The administration of injections or medical procedures are generally governed by state laws prohibiting the unauthorized practice of medicine.[103] Such medical practices should be handled only by properly licensed nurses under a doctor's direction, unless state law provides otherwise.[104] The problem of medical procedures goes beyond prescriptive medications and procedures and can even extend to the classroom.

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100. Tokarick v. Forest Hills School Dist., 665 F.2d 443 (3rd Cir. 1981); Tatro v. State of Texas, 625 F.2d 557 (5th Cir. 1980), *aff'd on remand* 516 F. Supp. 968 (N.D. Tex. 1981), 703 F.2d 823 (5th Cir. 1983).

101. An excellent summary of the policy implications of the *Tokarick* and *Tatro* cases can be found in Fearen, *Catheterization—School District Mandates Are Expanded Under 94-142*, 3 WEST'S EDUCATION LAW REPORTER 803 (1982).

102. A private school would have to decide what it would do if the parents insisted that the student be allowed to carry his own medications and refused to sign the release. It hardly seems worth losing a student when that prospect is weighed against the ambiguous appearance of illicit drug-taking.

103. *See, e.g.*, MINN. STAT. § 148.

104. *See, e.g.*, 63 PA. CONS. STAT. § 211.

In a recent case a college biology teacher permitted students to take blood samples from each other for a class experiment.[105] The blood was extracted while the students were sitting or standing. After extracting blood from one student the plaintiff fell forward breaking six teeth. The injured student successfully sued the professor and the school. The standard of care to which the professor was held is well worth noting. The court observed that a college professor who:

> approves and undertakes to supervise a project which includes the performance of a medical function such as the withdrawal of blood from volunteer students ... owes a duty to the volunteer patient or blood donor to see that the same precautions are taken for the safety and well-being of that patient as would be taken by licensed medical doctors in that locality.

All schools would be advised to have only properly licensed personnel perform medical procedures, or, in the case of certain simple class experiments such as taking blood samples, ascertain from a local medical doctor prior to the experiment what are the standard local safety procedures.

A final medication problem that has been a frequent source of concern among school officials has been the dispensing of over-the-counter medications, such as aspirin or anti-acids, by personnel in the school office.[106] Private schools have responded in one of three ways to this problem area: absolute prohibition of dispensing of any over-the-counter medications by the school; dispensing over-the-counter medications in reasonable amounts to any student who requests them; and dispensing such medications to a student only if the school has written or oral parental permission. The absence of any reported cases in this area probably reflects the low risks involved with dispensing over-the-counter medications. Nonetheless, the low risk of liability from unverified dispensing of such medications needs to be balanced against unnecessary student discomfiture because the school adamantly refuses to give him two aspirins. There seems to be little reason why such medications should not be made available to students, provided that the school has first received parental permission orally or in writing. A simple phone call plus a notation in a school log book, should the student desire the same medication in the future, would seem to be an adequate compromise.

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105. Butler v. Louisiana State Bd. of Educ., 331 So. 2d 192 (La. Ct. App. 1976).

106. This discussion of over-the-counter medications assumes that there is no emergency situation, in which case use of such medications, e.g., ointments, disinfectants, would probably be required under a "reasonable man" standard. *See* Mogabgab v. Orleans Parish School Bd., 239 So. 2d 456 (La. Ct. App. 1970).

Defamation

No area of law draws forth the kaleidoscope of human emotions as does the area of defamation where the written and spoken word are likened unto arrows piercing the reputation of indignant plaintiffs who allege a multitude of real or imagined injuries. Increased access by students and school employees to their records have caused defamation to be a genuine concern to those responsible for evaluating students and employees. Although school employees, including administrators, are prone to believe they have been defamed on certain occasions and may even threaten legal action, it is well to realize that defamation is a very difficult cause of action to prove in court. Any person maintaining a defamation cause of action must overcome a formidable number of defenses, particularly truth, qualified privilege, consent and "public figure."

At common law libel was more serious than slander and to some extent this distinction is still maintained.[107] However, the more enlightened position today in our electronic age is to treat libel and slander alike and require a plaintiff to prove that an untrue statement published to a third party not privileged to receive it resulted in damages, except in four categories:

(1) Words that impute the commission of a criminal offense;
(2) Words that impute infection of a communicable disease of any kind that would tend to exclude from society;
(3) Words that impute inability to perform or express lack of integrity in the discharge of duties of office or employment;
(4) Words that prejudice a particular person in his profession or trade.[108]

In the above four categories a plaintiff must prove that a statement is untrue and that there was a publication of the defamatory material to a nonprivileged third party but need not prove special damages.

Truth is always a complete defense to defamation and it is open for discussion under the federal and some state constitutions whether the motive of the person making the statements should make any difference.[109] Even where the absence of malice may appear to be a

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107. *See* MIRZA & APPLEMAN, *supra* note 23 at 378. For an example of a case where a court in a state that has abolished distinctions between libel and slander still appeared to maintain some vestige of distinction, *see* Stanley v. Taylor, 278 N.E.2d 824 (Ill. App. Ct. 1972).

108. *See* MIRZA & APPLEMAN, *supra* note 23 at 381. To these four categories some jurisdictions would add a fifth, unchastity to a woman. *See* W. PROSSER, LAW OF TORTS (4th ed. 1971).

109. *See, e.g.*, Delis v. Sepsis, 292 N.E.2d 138; PROSSER, *supra* note 108 at 796. In light of New York Times Co. v. Sullivan, 376 U.S. 254 (1964) it is doubtful under first amendment

requirement for a defense of truth, a jurisdiction may undercut the requirement with a rule of innocent construction.[110] There invariably are questions by students and school personnel whether written or oral statements are defamatory if they do not declare the "entire" truth. Essentially two kinds of concerns appear to be raised; whether statements with minor errors are defamatory and whether statements that relate the negative but not the positive are defamatory. There appears to be some support for the proposition that statements need be only substantially correct with no requirement of word-for-word accuracy,[111] but, of course, the more summary and conclusive the statement the greater the risk of defamation.[112] Regarding the second kind of concern, there does not appear to be a requirement that statements balance positive and negative elements in order to be true. In *Hett v. Ploetz*[113] a school district superintendent who had given a favorable recommendation for a teacher to secure a permanent teacher's license and who had encouraged the teacher to resign because he did not want to dismiss the teacher, did not act in bad faith when he later wrote an essentially negative letter of recommendation to another school superintendent to whom the teacher had applied to teach. In a more recent case the defamation complaint of a private liberal arts college[114] was dismissed against a book publisher when the following statement was published:

> Sex, drugs, and booze are the staples of life. . . . Sex is casual, and formal dating is unheard of; the pickup scene thrives in

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freedom of speech protections that good motivation mitigates a defense of truth. The Illinois Constitution, article I, § 4, would appear to increase a defendant's burden in libel trials: "All persons may speak, write and publish freely, being responsible for the abuse of that liberty. In trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense." In Foote v. Sarafyan, 432 So. 2d 877 (La. Ct. App. 1983) false charges of "deceit of the university" and "false pretenses" were harsh but not so unfair as to create liability.

110. For an application of the rule *see* Valentine v. North American Co. for Life and Health Ins., 328 N.E.2d 265 (Ill. 1974) where termination of an employee because "he was a lousy agent" was construed innocently to mean a generally unsatisfactory agency relationship existed. *See also* Kamsler v. Chicago American Pub. Co., 225 N.E.2d 434 (Ill. 1967).

111. Wilson v. United Press Ass'n, 98 N.E.2d 391 (1951); Ft. Worth Press Co. v. Davis, 96 S.W.2d 416 (Tex. Civ. Ct. App. 1936). *See also* Bookout v. Griffin, 639 P.2d 1190 (N.M. 1982). In Foote v. Sarafyan, 432 So. 2d 877 (La. Ct. App. 1983) a false charge of payroll fraud was not actionable because it was unsupportable by the evidence.

112. The vagaries of the use of conclusive language are illustrated by two cases where it was actionable to write of a minister, "I would not have anything to do with him or touch him with a 10 foot pole," Cole. v. Millspaugh, 126 N.W. 626 (Minn. 1910) but it was not actionable to call a lawyer a "bum in a gin mill." Werdberg v. La Guardia, 10 N.Y.S.2d 445 (N.Y. Sup. Ct. 1939).

113. 121 N.W.2d 270 (Wis. 1963).

114. Ithaca College v. Yale Daily News Publishing Co., Inc., 445 N.Y.S.2d 621 (N.Y. App. Div. 1981).

> ethics . . . the use of pot is a foregone conclusion, and cocaine occasionally manages to wend its way into the hands of those who can afford it. Speed and downers are common. . . .

The court never had to address the actual question of truth of the statement because it determined that the statement was not defamatory to the reputation of the college and the college failed to prove special damages.

Even if students or school personnel can prove that a statement is not true, they must prove that the untruth was published to a third person who was not privileged to receive it.[115] Untrue statements made directly to the party himself are not defamatory, but if the statement is overheard by a third party who would have no privilege to know the statement then there has been a publication.[116] A publication normally occurs only if made by the defendant so that a plaintiff's republication would not meet the requirement. However, there is some indication that a republication by a minor child may constitute a publication for defamation purposes, presumedly because it could be foreseen that a minor child would tell his parents or friends about any untrue statements.[117] Thus it would be wise for private school officials to beware of making unfounded charges against minor children, especially if the charges involve one of the four categories mentioned earlier not requiring proof of special damages, *e.g.*, sale or use of narcotics, venereal disease, theft, extortion, assault.

A publication has not occurred if statements, albeit untrue, are available only to school personnel directly involved with the student. Normally this privileged group (hence the term "qualified privilege") would include the student's classroom teacher(s), counselor, school administrator(s), and in relevant cases the school board members, school nurse, psychologist, social worker or other learning specialists.[118] Revelations of suspected wrong doing to supervisory personnel[119] or a

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115. The question of the point in time of publication is important because it begins the running of the statute of limitations. *See* Charles F. Scott, *For Whom the Time Tolls—Time of Discovery and the Statute of Limitations*, ILL. B.J. 326 (Feb. 1976) at 330.

116. Untrue statements dictated to secretaries appear to be a publication, but the cases are older. Rickbeil v. Grafton Deaconness Hosp., 23 N.W.2d 247 (N.D. 1946); Ostrowe v. Lee, 175 N.E. 505 (N.Y. 1931).

117. *See* Davis v. Askin's Retail Stores, Inc., 191 S.E. 33 (N.C. 1937).

118. Federal and state privacy acts appear to be broad enough to permit access by school officials with "legitimate educational interests" to information about a student and thus fall within the "qualified privilege" defense of tort liability. *See* 20 U.S.C. § 1232(g) and 45 C.F.R. § 99.30(a). *Cf.* Brown v. McConn, 138 S.E. 247 (Ga. Ct. App. 1927).

119. Merritt v. Detroit Memorial Hosp., 265 N.W.2d 124 (Mich. 1978); Bookout v. Griffin, 639 P.2d 1190 (N.M. 1982). A parent's petition to a school board was recently held to constitute an absolute privilege, Weissman v. Mogol, 462 N.Y.S.2d 383 (N.Y. Sup. Ct. 1983).

disciplinary or evaluation committee[120] within an organization are clothed with a qualified privilege. Likewise letters of recommendation as part of an employment or admissions procedure have a qualified privilege.[121] However, the protection of the qualified privilege is lost if plaintiff can prove the untrue statements, even though made only among a privileged group, were made with malice.[122]

In *New York Times Co. v. Sullivan*[123] the United States Supreme Court declared that untrue statements about "public officials" (later extended to include "public figures"[124]) were not actionable unless there was proof of actual malice. Just who are public officials or figures appears to depend on state law and has been extended to a wide range of school personnel in the public sector.[125] The *New York Times* privilege does not apply to cases involving private citizens[126] but a state can make the public-private distinction difficult to discern when a public official includes anyone

> carrying out a function of government or (who) is participating in acts relating to matters in which government has a substantial interest.[127]

Since it is questionable whether private school personnel are public figures it should not be assumed that statements made about such personnel will be protected under the public figure defense.

Although defamation is a difficult cause of action to prove there probably should be greater concern about such lawsuits during times of financial retrenchment when reduction in staff has been mandated. Some suggestions may make the prospect of such a lawsuit less likely:

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120. Scarpelli v. Jones, 626 P.2d 1190 (N.M. 1982); Small v. McRae, 651 P.2d 982 (Mont. 1982); Colson v. Stieg, 433 N.E.2d 246 (Ill. App. Ct. 1982); McGowen v. Prentice, 341 So. 2d 55 (La. Ct. App. 1976).

121. Hett v. Ploetz, 121 N.W.2d 270 (Wis. 1963); Burdett v. Hines, 87 So. 470 (1921); Lattimore v. Tyler Commercial College, 24 S.W.2d 361 (Tex. Comm'n App. 1930).

122. Welch v. Chicago Tribune Co., 340 N.E.2d 539 (Ill. App. Ct. 1975); Farrell v. Kramer, 193 A.2d 560 (Me. 1963). In Nodarr v. Galbreach, 429 So. 2d 714 (Fla. Dist. Ct. App. 1983) a teacher recovered $5,000 compensatory and $5,000 punitive damages against parents for comments made to a school board.

123. 376 U.S. 254 (1964).

124. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

125. State v. Defley, 395 So. 2d 759 (La. 1981) (school superintendent and school supervisor); Kapiloff v. Dunn, 343 A.2d 25 (Md. 1975) (high school principal); Johnston v. Corinthian Television Corp., 583 P.2d 1101 (Okla. 1978) (wrestling coach); Sewell v. Brook Bank, 581 P.2d 267 (Ariz. 1978) (classroom teacher); Gallman v. Carnes, 497 S.W.2d 47 (Ark. 1973) (assistant dean and professor of law); Byers v. Southeastern Newspaper Corp. Inc., 288 S.E.2d 698 (Ga. Ct. App. 1982) (dean).

126. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

127. Doctors Convalescent Cent., Inc. v. East Shore Newspapers, Inc., 244 N.E.2d 373 (Ill. App. Ct. 1968) (medical personnel in a private nursing home).

(1) Do not send unsolicited letters of recommendation. Obviously, no one can be required to write a letter of recommendation but sending one that is not requested may eliminate any qualified privilege and, if statements are untrue, may suggest malice.

(2) Make any negative comments as data based as possible. Conclusive statements such as "lazy", "not working up to capacity", "inefficient", "discipline problem" are subject to misinterpretations and simply not as helpful as "he was on time to 5 of 20 faculty meetings" or "he has failed to turn in 10 of his 20 assignments on time."

(3) If student or staff evaluation comments appear to be substantially negative submit the statement to the student or staff member for his consent prior to filing or sending. This procedure is not always possible but, since consent is an absolute defense, it may be a safeguard worth taking where possible. Always make it a practice to send a copy of the recommendation to the student or staff member prior to mailing, with a 3 to 4 day delay to provide time for possible response.

(4) Limit comments in student files or in letters of recommendation to first-hand accounts. To go beyond into the realm of rumor and hearsay is not only speculative, it may constitute reckless disregard for the truth.

(5) Permit students and staff to have access to their files even though such access may not be required by federal or state statutes.[128] There is no need to have information in a file that is hopelessly out of date and no excuse to have information that is possibly untrue.

(6) School officials need to be aware that even though truth may be a defense to defamation, it is not a defense to an action for invasion of privacy.[129]

Corporal Punishment and Child Abuse

Corporal punishment and child abuse are related but not identical problems. Corporal punishment in its broadest sense includes any physical contact between school personnel and students.[130] But more likely, however, it is understood as a narrower disciplinary procedure of physical punishment for an allegedly unacceptable act of behavior.

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128. The Federal Privacy Act applies only to schools receiving funds administered by the Department of Education, 20 U.S.C. § 1232(g), 45 C.F.R. § 99.1. State privacy statutes generally apply only to public schools, *e.g.*, ILL. ANN. STAT. ch. 122 § 50-2(b) (Smith-Hurd 1980); VA. CODE § 22.1-287 (1982).

129. For a discussion of invasion of privacy in an educational setting, *see* Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762 (Cal. Ct. App. 1983) ($250,000 judgment).

130. *See, e.g.*, Andreozzi v. Rubano, 141 A.2d 649 (Conn. 1958).

Liability for the use of corporal punishment depends upon a variety of factors such as: motive of the person doing the punishing; harm to the one receiving the punishment; size of the student; and instrument used.[131] Corporal punishment is generally subjected to a reasonableness test with results depending upon the varying sets of facts.[132] Because motive and reasonableness of administration are factors in corporal punishment delegation of authority by parents to spank and consent by parents to spank are valid defenses where a person administering corporal punishment has been charged with the crimes, or sued civilly for the tort of, assault and battery.[133] Private schools frequently incorporate such delegation or prior consent into application forms. Many schools require an annual consent form to be signed by parents or guardians and some even have parents sign a separate consent form to the administration of each instance of corporal punishment. The United States Supreme Court has refused to impose constitutional constraints upon the use of corporal punishment and students complaining of excessive or improper punishment must pursue available civil or criminal remedies.[134] The court also held that students were not entitled to procedural rights before being spanked, as a federal district court had earlier declared in *Baker v. Owen*.[135] States vary greatly in their approach to the use of corporal punishment from a blanket endorsement[136] to prohibition.[137]

However, even where state statutes or court opinions sanction the use of corporal punishment, it is probably safe to state that the most effective barometer of the reasonableness of physical force is the presence of marks on the person against whom the force was applied. Thus, it would not be unusual to find a criminal conviction[138] or the awarding of damages[139] for assault and battery where punishment, not otherwise harsh or excessive in itself, leaves marks or bruises on the students. In private schools where the use of corporal punishment is often justified

131. PERMUTH, MAWDSLEY & DALY, *supra* note 72 at 52.

132. *Contrast*, Thomas v. Bedford, 389 So. 2d 405 (La. Ct. App. 1980) *with* Goode v. State, 408 So. 2d 198 (Ala. Ct. App. 1981).

133. Mawdsley, *Child Abuse Reporting: Crisis in Christian Education*, 2 JOURNAL CHRISTIAN EDUC. 56 (1981).

134. Ingraham v. Wright, 430 U.S. 651 (1977). *See also* Hale v. Pringle, 562 F. Supp. 598 (M.D. Ala. 1983).

135. 395 F. Supp. 294 (M.D.N.C. 1975), *aff'd without opinion* 423 U.S. 907 (1975). *See also* Streeter v. Hundley, 580 S.W.2d 283 (Mo. 1979) where at least one state has accepted the abolition of the *Baker* procedural requirements.

136. MINN. STAT. ANN. § 609.06 (1980) (reasonable force to restrain or correct by a parent, guardian, teacher or other lawful custodian of a child or pupil).

137. N.J. STAT. ANN. § 18A:6-1 (1968) applies to both public and private schools.

138. People v. Ball, 317 N.E.2d (Ill. 1974).

139. Thomas v. Bedford, 389 So. 2d 405 (La. Ct. App. 1980).

on the basis of delegation of authority in an application or a separate consent slip, it is well to remember that parents cannot consent to an unreasonable amount of physical punishment toward their children. The safest protections from successful civil lawsuits or criminal prosecutions are reasonable parameters in administering corporal punishment:[140]

(1) No more than three swats;
(2) Have a witness present;
(3) Investigate any denial of guilt prior to administering corporal punishment;
(4) Designate only one person in the school to administer the punishment;
(5) Use corporal punishment as a last resort, with emphasis on alternative means of altering behavior;
(6) Provide notice to students and parents of the kinds of conduct which may result in corporal punishment.

Child abuse differs from corporal punishment in two significant aspects. First, neither delegation of authority to spank nor consent to spank are valid defenses in a criminal prosecution for child abuse, based upon the concept that no parent can consent to child abuse.[141] Second, the emphasis in corporal punishment is upon purposes, methods and motives whereas in child abuse the emphasis is solely upon the results produced.[142] Every state has a statute defining child abuse and mandating reporting of such abuse by certain categories of people with sanctions that can be imposed upon those who fail or refuse to report. There is a marked tendency among the states toward an expansive definition of child abuse, such "as any physical injury, mental injury or sexual mistreatment inflicted on a child other than by accidental means."[143] Another similarity among the states has been a trend toward expansion of the categories of those required to report suspected child abuse,[144] although the specific designation of who is to report is as

140. Without necessarily reflecting negatively upon the use of corporal punishment, a comment by Dr. Kerby Aloy, consultant on child mental health, highlights the tightening circle of abuse resulting from a school's use of corporal punishment: "Children who are being abused at home are more likely to have learning problems at school . . . and, therefore, they are more likely to be candidates for corporal punishment. These children do not need the school to also teach them that violence is the way to solve problems and to prepare them for adulthood. They need to see that other adults are more creative and more caring."

141. MAWDSLEY, *supra* note 133 at 57. PURSUING JUSTICE FOR THE CHILD 225-246 (M. ROENHEIM, ed. 1976).

142. MAWDSLEY, *supra* note 133 at 58.

143. ARK. STAT. ANN. § 43-807(b).

144. Sanctions for failure to report by those mandated to do so varies greatly from state to state: ALA. CODE § 26-14-13; MINN. STAT. ANN. § 221(b); NEV. REV. STAT. § 200.507; VA. CODE § 63.1-248.3(b) (criminal sanctions only). N.Y. SOC. SERV. LAW (McKinney) § 420; ARK. STAT. ANN. § 41-3-207 (civil sanctions only); Nebraska and Illinois (no legislative sanctions).

varied as the legislatures who have enacted the reporting requirements.[145] Almost every state[146] appears to mandate child abuse reporting by school teachers and administrators although the expansiveness of the statutory language varies greatly.[147] Clearly some of the mandated school categories could include not only the principal, teacher, coach, nurse, counselor, but also the secretary and even custodial staff.[148]

In addition to designating who must report and what types of suspected abuse must be reported, child abuse reporting statutes also designate to whom the suspected abuse is to be reported and what rights the alleged child abusers have. Reports are normally made to the local child welfare unit[149] but reports to local law enforcement officials are generally acceptable since the law enforcement officials must in turn contact the welfare agency.[150]

There are three levels of rights for the alleged child abuser:

(1) Rights prior to reporting;
(2) Rights after reporting and prior to civil or criminal action;
(3) Rights after civil suit or criminal prosecution is commenced.

Since serious sanctions can be imposed upon an alleged abuser even after the filing of a report, such as immediate temporary removal of a child from his parents, the most basic right of a parent or other person acting *in loco parentis* is to not have his name reported. For those in the educational field, the professional humiliation and fear of prosecution created by unnecessary reports are reason enough to exercise caution, even though statutes do not provide procedural safeguards at this point. In almost all states the parent and school officials are left at the mercy of broad definitions of abuse that seem to mandate and encourage the reporting of any physical or mental injury as long as it did not occur by accidental means. The occasional temporary bruise or scratch from corporal punishment or the alleged mental trauma because of repeated verbal reprimands to a problem student are all possible areas of reporting. Some states like Wisconsin have appeared

145. A thorough discussion of child abuse reporting statutes can be found in Mawdsley & Permuth, *Child Abuse Reporting: A Search for an Acceptable Balancing of Interests*, 9 NOLPE SCHOOL L.J. 115 (1981).

146. Vermont is an example of an exception to this rule and makes optional child abuse reporting by "school personnel." VT. STAT. ANN. § 1353(a).

147. ILL. ANN. STAT. § 2054 (school personnel, director or staff assistant of a nursery school or a child care center); ALA. CODE § 26-14-3(a) (school teachers and officials); NEB. REV. STAT. § 28-711 (school employee); TEX. CODE ANN. (Vernon) § 34-01 (any person having knowledge of . . . abuse or neglect).

148. MAWDSLEY & PERMUTH, *supra* note 145 at 117.

149. *See, e.g.*, LA. REV. STAT. ANN. (West) § 403(D((1).

150. *Id.* § 403(D)(3).

to remedy this problem by requiring the reporting of "severe bruising . . . or any injury constituting great bodily harm"[151] but in fact all bruises and injuries tend to be reported regardless of severity. The problem for the person whose name is unnecessarily reported is exacerbated by the statutory immunity from criminal or civil prosecution granted to those who report alleged child abuse. Most statutes protect the reporter if he acts in "good faith"[152] but some states have gone so far as to grant total immunity.[153] Because of the difficulty in proving a lack of "good faith," or on the other hand of proving "bad faith" or "malice," a reporter has virtual immunity from any legal sanctions.

The rights of an alleged child abuser after reporting and prior to civil or criminal sanctions are more clearly delineated in the statutes. Generally an alleged child abuser is entitled to a copy of the investigative report of the local social service agency with an opportunity to amend or expunge the report.[154] At a hearing to amend or expunge the report Illinois specifically requires that the person making the report must testify and at the same time Illinois follows the pattern of most other states by prohibiting the maker of a report from invoking a privileged relationship, such as physician-patient.[155] Needless to say the alleged abuser is entitled to employ an attorney to represent him.

The rights of an alleged child abuser after the commencement of a civil or criminal action are the same as for any other civil or criminal defendant. The most basic right is the engaging of competent counsel. If the action is a civil suit for damages against school personnel concerning alleged abuse arising out of the employment relationship, the insurer for the school will probably provide an attorney as part of the liability insurance coverage.[156] If the action is criminal prosecution, and most likely it will be, the accused abuser will have to secure and pay his own attorney, unless the school employee is indigent.

In concluding this section on child abuse there are four general admonitions private school personnel should be advised of. First, child abuse and child abuse reporting statutes apply equally to the public

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151. WIS. STAT. ANN. (West) § 940.201.

152. ILL. ANN. STAT. § 2059; LA. REV. STAT. ANN. (West) § 403(E); N.Y. SOC. LAW (McKinneys) § 419; MONT. REV. CODE ANN. § 41-3-203 ("unless the person acted in bad faith or with malicious purpose"); CAL. PENAL CODE (West) § 11161.5 ((unless it can be proven that a false report was made and the person knew or should have known that the report was false").

153. ALA. CODE § 26-14-9 (1975); OHIO REV. CODE ANN. § 2151.421.

154. ILL. ANN. STAT. § 2057.16.

155. *Id.* § 2060.

156. The duty of the school to protect students may be broader than the employment and in such a case the school district insurer is still obligated to defend the teacher. *See* Eversole v. Wasson, 398 N.E.2d 1246 (Ill. App. Ct. 1980).

and private sectors. There is no exemption for private schools. Second, almost all child abuse reporting statutes do not permit school personnel to exercise their judgment in deciding whether marks or injuries resulting from other than accidental means constitute child abuse.[157] Apparently only social services personnel are permitted to make such a determination. Third, a legislative policy mandating reporting cannot be subverted by a school's internal administrative policies. It is not unusual for schools to have a written or unwritten policy that school personnel are to report cases of alleged child abuse to a designated administrative official. Subordinate school personnel, if mandated to report by state statute, need to be aware that reporting suspected child abuse to a school administrator does not excuse them from their statutory responsibility if the administrator fails or refuses to notify social services. Fourth, any school personnel whose names are reported should act promptly to protect themselves and contact an attorney prior to granting an interview to a social services representative. Waiting until trial to engage legal counsel may jeopardize one's case if damaging admissions have already been made.

Equipment and Facilities

The potential for liability involving defective equipment or facilities exists theoretically in all areas of education but is a special concern in certain high-risk areas. As will be noted in this section and the one to follow on supervision the high risk areas for purposes of supervision are often the same as in the case of equipment and facilities and very often an alleged lack of supervision contributes to injuries alleged to have been caused by defective equipment or facilities. Clearly the highest risk area where the key issue is defective equipment or facilities is the industrial arts shop, followed by the science lab, the playground and athletics. School personnel have been found to be negligent in permitting students to use a known-defective burner in the science lab.[158] Likewise a defective blade guard on a circular table saw in an industrial arts wood shop generated liability for the school and the manufacturer of the saw because a school has a high responsibility for programs which "frequently expose young persons to dangers which they otherwise would not encounter in the school setting."[159] Football

157. The only exceptions appear to be South Carolina, S.C. CODE § 20-10-20(b) (Supp. 1979); Maryland, MD. ANN. CODE art. 72A, § 6(c)(1)(2); and Maine, ME. REV. STAT. tit. 22, § 3853(1).

158. Station v. Travelers Ins. Co., 292 So. 2d 289 (La. Ct. App. 1974).

159. South Ripley Commun. School Corp. v. Peters, 396 N.E.2d 144 (Ind. App. Ct. 1979).

appears to be the most dangerous athletic sport, and the helmet the most frequently litigated piece of equipment.[160]

The absence of safety features has frequently been the subject of litigation. In *Scott v. Independent School Dist. No. 709*,[161] a Minnesota statute required that,

> Every person shall wear industrial quality eye protective devices when participating in, observing or performing any function in connection with, any courses or activities taking place in eye protection areas . . . of any school, college, university or other educational institution in the state.[162]

The defendant school district was found liable for an eye injury to a student who had temporarily removed his safety goggles. The *Scott* court noted that the statute did not impose strict liability and hypothesized a set of facts where, despite repeated warnings, a student nonetheless took off his goggles, but it is doubtful that a court would ever find that set of facts. Similarly, courts generally find on behalf of injured students where blade guards are not present on shop equipment.[163] Shop teachers are expected to be able to anticipate safety hazards and act to minimize potential injuries. In *Edkins v. Board of Education of City of New York*[164] student injury resulting from being drawn into a piece of equipment by a loose shirt was determined to have been preventable had the school simply issued shop aprons to students to prevent the contact of loose clothing with equipment. It is expected that teachers will be familiar with the proper safety equipment to be used and substitution of a less safe piece of equipment may result in liability.[165] Generally, faculty members have the responsibility to know what the limits of safety are for any equipment to be used by students.[166]

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160. Gerrity v. Beatty, 373 N.E.2d 1323 (Ill. 1978) (improperly fitted football helmet); Everett Bucky Warren, Inc., 380 N.E.2d 653 (Mass. 1978) (manufacturer liable for improper hocky helmet construction and private school hockey coach liable for requiring student to wear helmet).

161. 256 N.W.2d 485 (Minn. 1977).

162. MINN. STAT. ANN. § 126.20(1). The statute applies equally to both public and private schools.

163. Knight v. City of Philadelphia, 445 A.2d 778 (Pa. Sup. Ct. 1982); Scott Cty. School Dist. No. 1 v. Asher, 312 N.E.2d 131 (Ill. App. Ct. 1974); Matteuci v. High School Dist. No. 208, 281 N.E.2d 383 (Ill. App. Ct. 1972) (blade guards not on circular table saws); Severson v. City of Beloit, 167 N.W.2d 258 (Wis. 1969) (absence of guard over a grinder that exploded).

164. 41 N.E.2d 75 (N.Y. 1942).

165. Kirchner v. Yale Univ., 192 A.2d 641 (Conn. 1963) (use of push stick instead of push block).

166. Miller v. Macalaster College, 115 N.W.2d 666 (Minn. 1962) (rented scaffolding).

It is expected that school personnel will choose facilities appropriate to the danger represented in high-risk areas. In the case of *Bush v. Oscada Area Schools*[167] a student was seriously burned when a ninth grade physical science lab was moved from the science laboratory to a vacant math room because repairs were being made to the laboratory. In addition to the classroom teacher's liability for failure to adequately instruct and supervise, the building principal was negligent in making the room assignment with the presumed knowledge that chemicals, fumes and flames would be present. School personnel and the school itself will generally be liable if a student is injured by a defect on the premises that could have been discovered with a reasonable amount of diligence.[168]

The problem of defective equipment or premises ought to be a concern for all school officials since it is difficult to defend a lawsuit based upon such a complaint. As between the student who generally must use whatever equipment or faculties he is instructed to use and a faculty member who is responsible for selection of equipment and facilities, it is difficult for schools to win. Even where a student increases the risk of injury through his own forgetfulness or disobedience courts are reluctant in non-comparative negligence states to allow a student's error be the basis for dismissal of the complaint.[169] Courts will sometimes go to what would appear to be extreme limits to find school liability as where a school was negligent in not replacing a floor to ceiling glass window prior to a student running through it while engaging in unauthorized races in a hallway. The school had earlier replaced glass at the other end of the hallway after a visiting coach had walked through it.[170]

Because of the substantial likelihood of successful lawsuits where defective equipment or facilities are involved the following steps should be taken to reduce the prospect of liability:

(1) Regularly inspect all equipment;
(2) Hire only personnel properly qualified so as to be reasonably assured that those personnel will be familiar with defects and safety measures;

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167. 250 N.W.2d 759 (Mich. Ct. App. 1977).

168. Androin v. Evangeline Parish School, 376 So. 2d 372 (La. 1979) (large piece of concrete on base path); Sims v. Etowak Cty. Bd. of Educ., 337 So. 2d 1310 (Ala. 1976) (improperly installed spectator bleachers); Short v. Griffits, 255 S.E.2d 479 (Va. 1979) (glass on track); *contra*, Nunez v. Isidore Newman High, 306 So. 2d 457 (La. 1975) (wet gym floor).

169. *See* Matteucci v. High School Dist. No. 208, 281 N.E.2d 383 (Ill. 1972) where the court imposed a higher duty on the teacher to offset student error. For an example of a comparative negligence state, *see* Scott v. Independent School Dist. No. 709, 256 N.W.2d 485 (Minn. 1977) where a $60,000 judgment in favor of the injured plaintiff was reduced to $54,000 because of ten percent student contributory negligence.

170. Wilkinson v. Hartford Accident & Indemnity Co., 411 So. 2d 22 (La. 1982).

(3) Instruct students in equipment defects and have them report immediately any indications of defects;
(4) Remove students from high-risk classes when they demonstrate disregard for safety rules;
(5) Instruct faculty to report all defects in equipment and facilities;
(6) Discontinue use of any equipment and facilities until defects or hazards are corrected;
(7) Inspect facilities prior to each use for defects or hazards.

Supervision of Students

Supervision of students is a multifaceted problem involving the interplay of a number of legal questions: whether the teacher's immediate presence could have prevented the student's injury;[171] whether the teacher adequately instructed the students regarding safety hazards;[172] whether a teacher adequately instructed subordinate or substituted employees;[173] whether a teacher made and enforced adequate safety rules;[174] and whether the number of supervisory personnel were adequate for the circumstances.[175] Clearly the threshold concern in supervising students ought to be competency of those directly responsible for supervision. Such competency may be related to formal training or to instructions by someone on the school premises. Thus it has been held to be negligence for a school to permit a janitor to supervise noon-time gym activites[176] and for a school to permit a student to treat an injured athlete.[177] The absence of teacher certification does not in itself appear to constitute negligence per se since presumably a certified teacher, instructing in a certain sub-areas of a broad certification area, may have less knowledge of safety hazards than a non-certified teacher with extensive practical experience in the sub-areas. In high-risk areas practical experience may be more important to successful defense of a lawsuit than formal certification. In *Green v. Orleans Parish School Board*[178] a teacher presumably certified in physical education but with no formal training in wrestling escaped liability largely because the way in which the student seriously injured himself did not depend upon proper instruction. The teacher in *Green* had

171. Brackmann v. Adrian, 472 S.W.2d 735 (Tenn. Ct. App. 1971).
172. Miles v. School Dist. No. 138, 281 N.W.2d 396 (Neb. 1979).
173. Larson v. Independent School Dist. No. 314, 289 N.W.2d 112 (Minn. 1980).
174. Matteucci v. High School Dist. No. 208, 281 N.E.2d 383 (Ill. App. Ct. 1972).
175. Raleigh v. Indiana School Dist. No. 625, 275 N.W.2d 572 (Minn. 1978).
176. Garber v. Central High School Dist., 251 App. Div. 214 (N.Y. App. Div. 1937).
177. O'Brien v. Township High School Dist., 392 N.E.2d 615 (Ill. 1979).
178. 365 So. 2d 834 (La. 1979).

learned some wrestling techniques from college wrestlers, books and short clinics but it would seem to be foolhardiness for a teacher to test the adequacy of his knowledge by the vagaries of the manner in which a student is injured. The use of persons to instruct in high-risk areas without knowledge of safety problems is potentially dangerous. In *Brahatcek v. Millard School District No. 17*[179] a student teacher who was assigned by the cooperating school to take the place of the absent regular physical education teacher was liable, along with the school, for the death of a student. The liability in *Brahatcek* appeared to hinge not on the status of student teacher but upon the alteration of the procedures in the curriculum manual by the other regular physical education teacher plus the student teacher's lack of awareness of safety hazards involving the swinging of golf clubs in a gymnasium. In *Lynch v. Board of Education of Collinsville*[180] coaching by untrained and inexperienced classroom teachers of a "powderpuff" girls' tackle football game created liability for the school district. If a teacher does not have practical experience in certain sub-areas of high-risk subjects it would probably be better to not offer those sub-areas at all. In a tragic set of facts a student, rendered a quadriplegic as a result of an injury in the gymnastics part of a physical education class, recovered a judgment in excess of $1,000,000.[181] Ninety percent of that judgment was against the physical education teacher who had just taken over the class a few weeks earlier after the prior teacher had been drafted. The new teacher not only unwisely continued the gymnastics part of the class but increased the difficulty of a basic gymnastics skill, a headspring over a rolled mat. By failing to sit on the rolled mat while student performed a headspring over the rolled mat the teacher appeared to lack even the most rudimentary knowledge of safety procedures and thus a simple exercise that could have been performed quite safely where supervised by a teacher trained in safety procedures was rendered extremely dangerous.

Although much is made of the fact of certification in certain situations,[182] the courts in tort liability cases appear to largely ignore the facade of certification and examine the teacher's knowledge and implementation of safety procedures. In one interesting Title VII non-tort liability case a federal district court actually rejected a school

179. 372 N.W.2d 680 (Neb. 1979).
180. 390 N.E.2d 526 (Ill. App. Ct. 1979).
181. Larson v. Indiana School Dist. No. 314, 289 N.W.2d 112 (Minn. 1980).
182. The failure of private schools to employ certified teachers have resulted in truancy convictions against parents, State v. Shaver, 294 N.W.2d 883 (N.D. 1980), State v. Moorhead, 308 N.W.2d 60 (Iowa 1981), and an injunction against operation of the school, State v. Faith Baptist Church of Louisville, 301 N.W.2d 571 (Neb. 1981).

district's defense that it could not accommodate an industrial arts teacher's claim to be absent for religious reasons because it had no certified industrial arts substitute.[183] The federal court appeared satisfied that even though the substitute was not a certified industrial arts teacher, he had helped construct buildings and had taken three years of industrial arts in high school. What tort liability implications such accommodation in Title VII cases might have where a student is injured while the non-certified teacher is in charge is uncertain, but liability would probably hinge upon the substitute's safety procedures and not upon his non-certification status.

The supervisory responsibilities of school personnel are affected by the nature of the area to be supervised. To increase the number of team players or reduce the size of a playing area may create liability. In *Sutphen v. Banthian*[184] a physical education teacher was negligent in increasing the number of players on a floor hockey team and at the same time reducing the playing area for each game to one-half of the gymnasium. The teacher's intention to involve as many of the students in the class as possible was admirable but deviations from prescribed rules or standard practice are always calculated risks in high-risk areas.[185] It is possible to enhance a school's potential for liability by increasing the size of the area to be supervised. In *Kersey v. Harbin*[186] an injured student alleged sufficient acts to warrant a trial on the issue of negligence where one physical education teacher, during the absence of another physical education teacher, agreed to handle both classes at the same time. The student injury occurred between the locker room and the gymnasium while the one teacher was in the locker room. In *Kersey* both teachers had assured the principal that one teacher could handle both classes. The failure of the principal to take reasonable safety measures, irrespective of the teacher's assurances, resulted in the appellate court's refusal to dismiss plaintiff's action against him.

The distance that supervisory personnel are away from the site of injury is a factor in court decisions but there is obviously no requirement that a teacher be in close proximity to every student. There is no way to predict what is a safe distance to prevent liability because the distance must always be related to the nature of any danger. A teacher 1000 feet from a student injured on a playground has been held to have been too far away to provide adequate supervision.[187] Such a great distance

183. Wangsness v. Watertown School Dist., 541 F. Supp. 332 (D.S.D. 1982).
184. 397 A.2d 709 (N.J. 1979).
185. *See also* Brahatcek v. Millard School Dist. No. 17, 273 N.W.2d 680 (Neb. 1979) where deviations from a school's prescribed curriculum guide was a basis for liability.
186. 591 S.W.2d 745 (Mo. Ct. App. 1979).
187. Decker v. Dundee Cent. School Dist., 151 N.E.2d 866 (N.Y. 1958).

probably provides inadequate supervision regardless of the apparent safety of a play area. One teacher, while superivising alone a football field size play area, prevented liability for herself and her school district by positioning herself approximately 30 feet from the stump of a tree recently cut down.[188] It should be added that the stump had apparently been cut smooth on top; just how the court would have decided the case had the student been injured on a stump with rough, jagged edges is difficult to say. Occasionally teachers have work or storage areas that do not permit visual contact with all students at all times. Liability in such cases is never predicated solely upon the distance of the teacher from the student or the lack of visual contact but upon whether the teacher should have reasonably anticipated certain kinds of problems, such as conflicts among students,[189] danger represented by certain kinds of equipment[190] and the possibility of student error due to inadequate instruction for new equipment.[191]

Adequacy of teacher instruction as related to the potential danger of a school area is a legal problem that demands particular attention. The recent case of *Smith v. Archbishop of St. Louis*[192] is a good example of the relationship among teacher supervision, teacher instruction and a potentially dangerous classroom situation. In *Smith*, a teacher in a Roman Catholic elementary school had placed a lighted candle on her desk as a religious exercise. The second graders in plaintiff's room were preparing for a school play and while plaintiff and her classmates were putting on their paper constumes in the classroom plaintiff's costume caught fire on the candle resulting in burns to 22 percent to 45 percent of her upper body. The plaintiff spent 26 days in a hospital with much physical and psychological pain because of burns and grafting. Plaintiff's psychologist testified regarding permanent psychological harm when plaintiff reaches adolescence because of very noticeable scars. In upholding a $1,250,000 judgment against defendant archdiocese the appellate court appeared to rely upon the following facts in the case:

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188. Partin v. Vernon Parish School Bd., 343 So. 2d 417 (La. Ct. App. 1977).

189. Hammond v. Scott, 232 S.E.2d 336 (S.C. 1977); Collins v. Wilson, 331 So. 2d 603 (La. 1976); Kim v. Hawaii, 616 P.2d 1376 (Hawaii 1980).

190. Lawrence v. Grant Parish School Bd., 409 So. 2d 1316 (La. Ct. App. 1982) (saw without blade guard).

191. Miles v. School Dist. No. 138, 281 N.W.2d 396 (Neb. 1979) (instruction to student who had operated same machine in prior class); Potter v. North Carolina School of the Arts, 245 S.E.2d 188 (N.C. 1978) (instruction to student who had never operated before a fog machine); Brittan v. State, 103 N.Y.S.2d 485 (Minn. 1951) (instruction to students administering physical education tests); Miller v. Macalaster College, 115 N.W.2d 666 (Minn. 1962) (instruction in assembling and use of scaffolding).

192. 632 S.W.2d 516 (Mo. Ct. App. 1982).

(1) The classroom teacher knew that students and lighted candles posed danger but no special instruction had been given prior to the day of injury and none given on the day of the injury.
(2) The principal of the school acknowledged that seven and eight year old children do not pay much attention to their own safety.
(3) Defendant archdiocese had no guidelines or policy regarding burning candles in a classroom.

While noting that school is not an insurer of a child's safety and that a teacher is not required to keep each member of her class within her eyesight at all times, the *Smith* court declared that ordinary care for children requires more vigilance and caution than for adults.

Supervision of students is obviously a critical school responsibility and one that can be costly in money and public relations where such supervision is inadequate. The higher the risk area the greater is the duty to supervise and the greater the likelihood that a school may be found negligent even where it appeared to exercise ordinary care. The chain reaction effect of liability is illustrated in *Sansonni v. Jefferson Parish School Board*[193] where an injured sixth-grade plaintiff recovered $45,000 as a result of a fall in a school lunchroom on some spilled spaghetti sauce. The *Sansonni* court noted that a school lunchroom is a high-risk area and the defendant school's failure to adequately supervise made it responsible for all costs and damages. Normally a fall on a lunchroom floor might produce a bruise but in the case of the plaintiff it resulted in a broken leg because plaintiff had osteogenesis imperfecta, a congenital defect causing brittle bones. Plaintiff spent 34 days in traction and six weeks in a body cast as a result of which he developed kidney stones necessitating six more days in the hospital. The prolonged hospitalization and wearing of the body cast contributed to a fracture of the vertebrae resulting in the need to wear a back brace. However, despite the correct medical care, one leg did not heal properly so that one leg was shorter and bowed. The bowed and shorter leg put strain on the other leg necessitating wearing a leg brace. What began as a simple fall in a high-risk area ended up as a painful experience for the student and an expensive lesson for the school.

No area of supervision gets more attention from private school administrators than absence of supervision. Normally absent supervision is approached solely as an absent teacher problem; such an approach is unfortunate since there are really two separate and distinct problem areas—the absent student and the absent teacher. A student may be

193. 344 So. 2d 42 (La. Ct. App. 1977).

absent from adult supervision for a number of reasons. Students in hallways during classes and in restrooms are very often unsupervised. In *Larry v. Commercial Union Insurance Co.*[194] a day care student injured in a restroom successfully sued the school when the large number of students in the classroom permitted the student to leave the classroom for the restroom without the knowledge of the teacher. As mentioned earlier, liability in such absent student situations is probably based less on the absence of direct supervision than upon the presence of dangerous conditions such as wet restroom floors or assaults in the hallways or restrooms by older students or strangers that could have reasonably been anticipated by school personnel. Students need to be instructed frequently on safety rules in hallways and restrooms including the reporting promptly of dangerous or suspicious circumstances, such as wet floors or strangers in the building. The more school personnel deviate from established rules or routines the greater the likelihood of liability. To send students to restaurants, neighboring stores or a teacher's care in the parking lot to secure items personally for teacher use or items for school use are situations that would be difficult to justify in court. The sending of ill or injured students to a nurse's office or the school office are frequent school procedures, yet seldom is much thought given to problems that should be reasonable anticipated on the way to the office. Does the student know the way to the office? Is he so ill or injured that other students should be sent with him? Is there reason to expect problems in the hallways, such as other aggressive students? With elementary students it is never a bad practice to send one or two students along with a student sent to the office to assure that he does in fact arrive at his destination. Junior and senior high students would probably not want a fellow traveler unless they do not know the way or appear to be too ill to be sent alone. A teacher or school would normally not be liable for assaults in hallways, restrooms or other unsupervised areas unless there was actual knowledge of specific indications of bad feeling between students[195] or of systemic school unrest, such as racial unrest.[196] A student who leaves school without permission and is injured or killed normally does not generate liability for the school.[197]

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194. 277 N.W.2d 821 (Wis. 1979).

195. Gammon v. Edwardsville Commun. Unit School Dist. No. 7, 403 N.E.2d 43 (Ill. App. Ct. 1980).

196. School Bd. of Palm Beach Cty v. Anderson, 411 So. 2d 797 (Fla. Dist. Ct. App. 1982).

197. Levandoski v. Jackson Cty. School Dist., 328 So. 2d 339 (Miss. 1976) (student killed after skipping school); Oglesby v. Seminole City Bd. of Instr., 328 So. 2d 515 (Fla. Dist. Ct. App. 1976) (student killed on way home from school). *Contra* Hoyem v. Manhattan Beach City School Dist., 585 P.2d 851 (Cal. 1978) (student injured after skipping out of school).

The teacher who absents himself from the classroom or area where students are located presents a more frequently litigated problem, but such a problem is one over which private school administrators should have more direct control. Contrary to popular myth there is no absolute liability for a teacher or school if a teacher leaves his classroom unsupervised. Any liability in such a situation will depend upon resolution of two factual questions. First, it will have to be determined whether the teacher's presence could have prevented the student injury, and such a determination will depend upon the nature of the class, *e.g.*, English composition versus industrial arts and upon knowledge of the students in the class, *e.g.*, personal hostilities or medical or special education problems. Second, the reason for teacher absence needs to be balanced against the items in the first question above. Reasons for teacher absence can best be viewed on a spectrum from emergency situations at one end, as where a teacher assists an ill or injured student ot the office, to solely personal concerns at the other end, as where a teacher goes to the faculty lounge during classtime for a cup of coffee.

The farther toward the emergency end of the spectrum for a teacher's absence the more substantial the proof will have to be to show that the teacher's presence could have prevented an injury. The reverse of this is true when the teacher's absence moves closer to the personal end of the spectrum. In *Lawrence v. Grant Parish School Board*[198] an industrial arts teacher who frequently left the class to get scrap metal for welding and to catch students smoking was found negligent, along with the school, when a student severed a finger on a table saw stored in one of the welding booths. The fact that the teacher told the students at the beginning of the course not to use the power equipment and that he gave them a list of over 200 rules regarding the use of equipment in class did not excuse or mitigate his absence. Industrial arts classrooms are high-risk areas and the teacher's absence in *Lawrence* suggested poor lesson planning as well as performance of unnecessary policing functions during classtime. In *Cirillo v. City of Milwaukee*,[199] forty-eight twelve- to fourteen-year-old students were instructed to shoot baskets and not to engage in horseplay while the teacher left the class for some unknown reason. The teacher was absent for twenty-five minutes and during that time two students began engaging in progressively rougher conduct of keep-away until plaintiff was injured. Whereas the teacher's positive and negative instructions to the students were commendable, and are proper procedures to follow for any

198. 409 So. 2d 1316 (La. Ct. App. 1982).
199. 150 N.W.2d 460 (Wis. 1967).

teacher absence, the supreme court reversed the trial court's dismissal of the complaint. In *Kim v. State of Hawaii*[200] a female teacher left her classroom to go next door to get the principal and assistant principal to restrain a student who had suddenly entered her classroom to attack one of the students. During her brief absence the student attacked was seriously injured. The supreme court affirmed the trial court's dismissal of the complaint, primarily because this was an emergency situation with no reasonable notice to teacher of the probability of invasion of the classroom by another student. Finally, in *Hammond v. Scott*[201] an industrial arts teacher was in a storage room adjacent to the classroom supervising storage of projects when one student standing two feet from a trash barrel threw a nail toward the trash barrel and struck plaintiff in the eye. Dismissal of the complaint against the teacher and the school was sustained because the teacher consistently enforced his rule against throwing objects and because there was no evidence of ill feeling between the two students.

Adequate supervision is definitely the key to the avoidance of unwanted litigation. The following general suggestions may tend to increase the safety awareness of supervisory personnel.

(1) Hold at least one faculty and staff in-service day at the beginning of each school year to make school personnel aware of potential problems. Faculty and staff should have primarily a prophylactic function with regard to student safety rather than a reactive function.
(2) Faculty in high risk equipment areas should test each student on each piece of equipment and have each student sign a set of course safety rules to acknowledge receiving and reading them.
(3) Periodic oral instructions in high risk equipment areas are always advisable, *e.g.*, guard must be on the saw before use.
(4) Instruct students specifically of safety hazards on school facilities that are to be reported, *e.g.*, water on floor, broken stair treads, broken desks, glass or sharp stones on playground, malfunctioning equipment.
(5) Permit faculty to supervise activities only if their qualifications are sufficient for the level of risk of the subject area being supervised.

200. 616 P.2d 1376 (Hawaii 1980).
201. 232 S.E.2d 336 (S.C. 1977).

2

Constraints on Student and Faculty Discipline

Introduction

The subject of discipline in a school setting applies in a broad sense to penalties resulting from an academic or misconduct set of facts. The subjects of student and faculty discipline have normally been treated separately in the public sector.[1] There are several reasons why student and faculty discipline in private schools can legitimately be considered together. First, the constitutional substantive and procedural constraints affecting public schools are generally not applicable to private schools. Second, private school student and faculty rights alike are generally contractual in nature expressed in or implied from written documents such as applications, promotional literature and handbooks. Third, although contractual rights in private schools could be modulated so that faculty members theoretically could have more substantive and procedural due process rights than students, the contractual rights of both students and faculty are often very similar in their nature and extent. Fourth, the relative dearth of reported cases involving private school rights when compared with the multitude of cases in the public sector makes the consideration of faculty and students together more feasible.

The substantial freedom of private schools from the constitutional constraints that have plagued public sector attempts at discipline for the past fifteen years has become a mixed blessing to private schools. Because private school officials are usually aware that they are almost totally immune from constitutional due process requirements, such officials have often not evaluated adequately their school materials which form the basis of student and faculty contractual relationships with the school. It is not unusual to find private school applications, promotional materials and handbooks that contain language that is incomplete, inconsistent or inaccurate. The contractual nature of private

1. *See, e.g.*, R. PHAY, THE LAW OF PROCEDURE IN STUDENT SUSPENSIONS AND EXPULSIONS (NOLPE Monograph 1977) and F. DELON, LEGAL CONTROLS ON TEACHER CONDUCT: TEACHER DISCIPLINE (NOLPE Monograph 1977).

school relationships requires continuous monitoring by competent legal counsel if school policies and procedures are to be adjusted to changes in judicial constructions of contracts. One source has ably expressed the private school's legal responsibility as follows:

> Critical to preventive planning is periodic review of institutional policies and practices. Many institutions develop a faculty handbook and assume the handbook contains all of the appropriate policies relating to personnel and institutional concerns. Rarely is this the case. Practices change as do federal and state statutory and regulatory requirements, all of which necessitate constant revision of faculty handbooks. Similarly student affairs policies should be reassessed periodically to ensure that they conform to institutional requirements and reflect fair process. Sometimes institutions follow practices that are inconsistent with their policies; if this is the case, then either the practice should be changed to reflect policy or the policy should be changed so that it comforms to the practice.[2]

Constitutional Constraints

The almost total immunity of private schools from the constitutional restraints that have plagued public institutions is the result of the general inapplicability of the fourteenth amendment to private schools.[3] The most frequently used instrumentality in attempting to bring private schools within the aegis of constitutional protections is section 1983 of the Civil Rights Act.[4] However, section 1983 applies to official state action only so that a plaintiff must utilize one or more of the three dominant theories by which private activity can be deemed state action for federal jurisdictional and constitutional purposes: the state entanglement theory, the state function theory, and the state likeness theory.[5] A recent federal appeals court sustained a successful section 1983 action by former students against a private school for youths with behavioral problems for its use of a behavioral modification program because "the state has so insinuated itself with the Provo Canyon School as to be considered a joint participant in the offending

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2. LEGAL DESKBOOK FOR ADMINISTRATORS OF INDEPENDENT COLLEGES AND UNIVERSITIES II-2,3 (K. WEEKS, ed. 1953).

3. The fourteenth amendment provides, in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of law, nor deny to any person within its jurisdiction the equal protection of the laws.

4. 42 U.S.C. § 1983.

5. These three theories are discussed in Huff v. Notre Dame High School, 456 F. Supp. 1145 (D. Conn. 1978); *see also Constitutional Law—Application of the Fourteenth Amendment To Private Schools*, 23 S.C. L. REV. 804 (1971).

actions."[6] in that case, involuntary placement of students by a juvenile court in the school, detailed learning contracts between the private school and public school districts, state funding for tuition, school promotion of state funding in its promotional literature plus a number of applicable state regulations were collectively held to constitute state action.[7] In *Jackson v. Statler Foundation*[8] a private charitable foundation was found to be subject to section 1983 because it was substantially dependent upon its congressionally permitted exempt status, the I.R.S. regulatory scheme was both detailed and intrusive, the appointment of governing committee members involved selections by public officials and there was a presumption that all private foundation activities are public functions.[9] In *Jackson* the federal court enumerated five factors which are important to a determination of state action:

(1) the degree to which the private organization is dependent on governmental aid;
(2) the extent and intrusiveness of the governmental regulatory scheme;
(3) whether that scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotation;
(4) the extent to which the organization serves a public function or acts as a surrogate for the State;
(5) whether the organization has legitimate claims to recognition as a private organization in associational or other constitutional terms.

Generally though, unless a private school has significant involvement with the state, such as incorporation into the state university system with one-third of funds paid by that system,[10] it is difficult to find a sufficient number of contacts for state action. A list of the state contacts that have not been sufficient to find state action is revelatory of an apparent judicial reluctance to transform private schools into public schools and thus impose constitutional burdens upon private schools. A fairly complete list of such contacts not sufficient to constitute state action includes the following:

(1) Reception of state and/or federal assistance;[11]

6. Milonas v. Williams, 691 F.2d 931 (10th Cir. 1982).
7. *Id.* at 940.
8. 496 F.2d 623 (2d Cir. 1974).
9. *Id.* at 634.
10. Braden v. University of Pittsburg, 343 F. Supp. 836, *rev'd*, 477 F.2d 1, *on remand*, 393 F. Supp. 118 (1975).
11. Rendell-Baker v. Kohn, 488 F. Supp. 764 (D. Mass. 1980); Murphy v. Villanova, 547 F. Supp. 512 (E.D. Pa. 1982); Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973).

(2) Accreditation or state licensure;[12]
(3) Granting of a state charter;[13]
(4) Certification of teachers;[14]
(5) Tax exemption;[15]
(6) Filing of state forms;[16]
(7) Performance of a public function, viz., education.[17]

The effect of a finding of no state action for almost all private schools is that faculty and students can be disciplined or dismissed without adhering to the formal, and sometimes very rigid, substantive and procedural due process standards imposed upon public schools.[18] Rules under which faculty and students can be disciplined are often quite general. Attacks upon such general rules as not meeting a constitutional standard of notice have consistently failed. In *Aronson v. North Park College*[19] a student diagnosed as a chronic paranoid by a staff psychologist in an independent clinic partly funded by the college was dismissed when information regarding plaintiff's condition was sent to the college Dean of Students. Although the court almost solely addressed plaintiff's breach of contract arguments, the plaintiff had also phrased one of the counts of her complaint as a violation of her constitutional right to due process. In apparently sustaining the dismissal of plaintiff's constitutional cause of action the Illinois court seemed to indicate that there was no constitutional infirmity with school catalog provisions permitting dismissal where a student is "undesirable and whose continuation in the school is detrimental to himself or his fellow students" and despite the fact "such dismissal may be made without

12. Huff v. Notre Dame High School, 456 F. Supp. 1145 (D. Conn. 1978); Geraci v. St. Xavier High School, 13 Ohio Op. 3d 146 (Ohio 1978); Bright v. Isenbarger, 314 F. Supp. 1382 (N.D. Ind. 1970).
13. Fischer v. Driscoll, 546 F. Supp. 861 (E.D. Pa. 1982); Blackburn v. Fisk Univ., 443 F.2d 121 (6th Cir. 1971).
14. Geraci, *supra* note 12.
15. Bright, *supra* note 12; Brown v. Mitchell, 409 F.2d 592 (10th Cir. 1969).
16. Bright, *supra* note 12.
17. Huff, *supra* note 12; Berrios v. Inter-American Univ., 409 F. Supp. 769 (D.P.R. 1975), *appeal dismissed*, 426 U.S. 942 (1975); Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968).
18. *E.g.*, The landmark case of Goss v. Lopez, 419 U.S. 565 (1975) and its requirement that a suspension of 10 days or less requires notice of charges, explanation of evidence against student and opportunity for a student to present his side has spawned an extensive progeny of cases. In response to *Goss* many state legislatures have enacted statutes specifying formal due process procedures before a public school student can be suspended or expelled with those procedures often going beyond the constitutional requirements, *e.g.*, California Education Code section 48900. *See* John A. v. San Bernardino City Unified School, 654 P.2d 242 (Cal. 1982) for an interpretation by the California Supreme Court of its own statute.
19. 418 N.E.2d 776 (Ill. App. Ct. 1981).

specific charge."[20] In *Geraci v. St. Xavier High School*[21] a student's expulsion was upheld where the school catalog listed as grounds for expulsion, "conduct detrimental to the reputation of the school," "immorality in talk or action." Although the *Geraci* court found that there was no state action so as to invoke constitutional safeguards through section 1983, it is well to be aware that the court did not appear to view the general nature of the rule totally independent from the nature of the student's conduct and from the necessity of a modicum of procedural fairness. In *Geraci* the expelled student had aided another student who threw a pie in the face of a teacher who was monitoring an exam. The student was subsequently called to the office where he admitted his complicity in the act. The student was notified that he was expelled but the expulsion did not become final until after there were a series of discussions among various school officials and between the school president and the student's father. The *Geraci* court's standard for substantive and procedural rights for students and faculty is a fair statement of the status of the law for private schools:

> Although ... a private school's disciplinary proceedings are not controlled by the due process clause, and accordingly such schools have broad discretion in making rules and setting up procedures for their enforcement, nevertheless, under its broad equitable powers a court will intervene where such discretion is abused or the proceedings do not comport with fundamental fairness.[22]

The leading case of *Flint v. St. Augustine High School*[23] likewise reflects the conclusion of *Geraci*. In *Flint* two students were expelled for violating a school rule prohibiting smoking within two blocks of school. The rule specifically provided for a fine after the first offense and dismissal after a subsequent violation. Despite the fact that prior student repeat offenders had always been fined and no one had ever

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20. *Id.* at 782. Although similar general or vague reasons for dismissal have been upheld in public schools, important differences between public and private schools are that not only will courts examine whether the rule's language is so vague as to not furnish adequate notice of the impropriety of his action before a teacher or student committed it, but whether the student or faculty member in fact is given notice as to which aspect(s) of his conduct is inappropriate and which rule the conduct is alleged to violate. Claims that public school rules are too vague are fairly common but not always upheld when the student or teacher was given advance notice what specific conduct violated the rule. *See, e.g.*, Linwood v. Board of Educ., 463 F.2d 763 (1972) ("gross disobedience," "misconduct"); *In re* K.P., 514 P.2d 1131 (Colo. 1973) ("behavior which is inimicable to the welfare, safety or morale of other pupils"). *See generally* R. PHAY, THE LAW OF PROCEDURE IN STUDENT SUSPENSIONS AND EXPULSIONS, *supra* note 1 at 4-10.

21. Geraci, *supra* note 12.

22. *Id.* at 149.

23. 323 So. 2d 229 (La. Ct. App. 1976).

been dismissed for smoking, the expulsion of the student plaintiffs was upheld because the court observed,

> we cannot say that such a penalty was beyond the scope of the disciplinary powers granted to the principal and acknowledged to be clearly within his authority and discretion. . . .
>
> both young men were on notice of the result which would ensue upon their next violation of the smoking rule. When the specific dismissal precipitating violations did, indeed, occur, the young men were confronted by their accusers and the record offers no indication that these specific accusals were unjustly or erroneously made.[24]

The minimal safeguards provided the plaintiffs of notice of offense, notice of punishment and opportunity to present their side apparently persuaded the court to make its often-quoted statement of law,

> [P]rivate institutions like St. Augustine High School have a *near* absolute right and power to control their own internal disciplinary procedure which, by its very nature, includes the right and power to dismiss students. That is not to say that due process safeguards can be cavalierly ignored or disregarded. But, if there is *color of due process*—that is enough.[25]

In *Rendell-Baker v. Kohn*[26] the United States Supreme Court upheld the dismissal of a teacher because there was no state action for purposes of section 1983, even though it was assumed that the teacher

> was dismissed as a legitimate exercise of her free speech and that her dismissal was not accompanied by the procedural safeguards which would be required if the action were attributable to the State.[27]

The Supreme Court carefully framed the issue as

> not whether petitioners were discharged because of their speech or without adequate procedural protections, but whether the school's action in discharging them can fairly be seen as state action.[28]

Although the full implications of *Rendell-Baker* remain to be seen, it would appear that some conclusions can be made about constitutional rights in private schools.

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24. *Id.* at 234, 235.
25. *Id.* at 234-235 (emphasis added).
26. 102 S. Ct. 2764 (1982).
27. 488 F. Supp. 764, 765 (D. Mass. 1980).
28. 102 S. Ct. at 2770.

(1) Substantive due process rights, *e.g.*, speech, association, press, can be circumscribed and defined by private schools. Courts will not inquire into the reasonableness of rules unless a rule is contrary to some pervasive public policy.[29]

(2) Constitutional rights of students and faculty are essentially the same. Courts consistently view private school faculty and student's rights as contractual in nature and as long as a modicum of procedural safeguards are provided with a view toward fairness and as long as any additional rights provided in faculty and student handbooks are honored, courts do not appear to require more rigid standards. For private schools with a religious nexus there may be additional protection from unnecessary intrusion into its internal affairs from the first amendment religion clauses.[30]

(3) The minimum procedural rights that appear to be required from an equitable standpoint of fairness are notice that certain conduct violates a school rule, notice of possible punishment, *e.g.*, contract termination, expulsion, and an opportunity for a student or faculty member to present his side of the case. Where the rule under which discipline is contemplated is very general, the student or faculty conduct must be such that he reasonably should have known he was in violation of the rule or that he had previously been advised that such conduct violated the rule.[31] The

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29. Public policy is a limitation upon private school rules so that certain benefits such as tax exemptions can be denied to such schools. Bob Jones Univ. v. United States, 103 S. Ct. 2017 (1983). The United States Supreme Court has already declared that it is a violation of public policy for private, non-sectarian schools to exclude students on a racial basis. Runyon v. McCrary, 427 U.S. 160 (1976). *See also* Bob Jones Univ. v. Johnson, 398 F. Supp. 597 (D.S.C. 1974) where the school was divested of eligibility for V.A benefits. What is not clear is that if a school rule is violative of public policy whether such a conclusion would support a section 1983 action. For a thorough discussion of the implications of the *Bob Jones* litigation *see* R. Mawdsley & S. Permuth, *Bob Jones University v. United States; Public Policy and Religious Educational Institutions*, 1 WEST'S EDUC. LAW REPORTER 745 (1982).

30. In National Labor Relations Board v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) at 502, the Court suggested that inquiries into the practices of religious schools that did not "go beyond resolving factual issues" might be permissible. But where an inquiry would involve conclusions to be drawn regarding "the good faith of the position asserted by the clergy - administrators and its relationship the school's religious mission" the process of inquiry as well as the conclusions drawn "may impinge on rights guaranteed by the Religion Clauses" *Id.* The difficulty of determining constitutional limitations of inquiry were contractual issues are allegedly at stake has been recently raised in the firing of four nuns from their teaching positions in a Catholic elementary school. Reardon v. Lemonyne, 454 A.2d 428 (N.H. 1982).

31. Although not involving a constitutional question, the cancellation of a divorced Catholic lay teacher's contract prior to the beginning of the school year was upheld because the teacher's educational background in Catholic seminary and graduate programs should have alerted him to divulge his divorced status. Bischoff v. Brothers of the Sacred Heart, 416 So. 2d 348 (La. Ct. App. 1982).

matter of impartiality of the person or tribunal making faculty or student discipline decisions, right to counsel and right to call and cross-examine witness do not appear to be the significant problems that they are in the public sector.[32] But private schools should definitely consider using a hearing board of three or five members appointed or elected on an annual basis to have *de novo* review authority over decisions pertaining to student or faculty discipline. And even though there is no necessity for according faculty or students the right to have counsel present at a hearing, faculty or students should be permitted to call and cross-examine witnesses.

(4) A reasonable school rule or reasonable due process procedures on their face to not necessarily immunize a private school from adverse state administrative decisions[33] or from adverse decisions under the panoply of federal anti-discrimination acts.[34]

Contractual Constraints

In private education the relationship between the school and the parents of minor students or the school and students who have rached their legal age of majority or the school and faculty is generally recognized to be one of contract with the contract including all of the school's published material such as application forms, brochures, and handbooks.[35] Since contract problems can apply with equal effect in the public as well as private sector, public cases will also be discussed in this section where contract principles equally applicable to private schools

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32. *See* R. PHAY, *supra* note 1 at 12-24 and J. BECKHAM, LEGAL ASPECTS OF TEACHER EVALUATION (NOLPE Monograph 1981) at 11-12, 33-40.

33. In Holy Name School v. Department of Industry, 326 N.W.2d 121 (Wis. App. 1982) a Catholic lay teacher who did not have her employment contract renewed because she married a divorced man before all the steps necessary to have the marriage blessed had been taken was nonetheless qualified to receive unemployment benefits. Unfortunately the attorney for the school failed to raise any constitutional arguments at the trial so the appeals court would not consider them. In Kelley v. Day Care Center, Inc., 451 A.2d 1106 (Vt. 1982) a private school was determined to be subject to the Vermont Labor Relations Board and a teacher dismissed for her role in a labor dispute was entitled to back pay and raises she would have received had she not been illegally discharged. *See also* Reardon v. Lemoyne, 454 A.2d 428 (N.H. 1982) for a discussion of the relationship between contract matters and religious doctrine.

34. *See generally* the chapter on Federal Anti-Discrimination Legislation.

35. *See generally* S. PERMUTH, R MAWDSLEY & J. DALY, THE LAW, THE STUDENT AND THE CATHOLIC SCHOOL (1981) and S. PERMUTH, R. MAWDSLEY & R. BROWN, ADMINISTRATIVE ISSUES IN CATHOLIC SCHOOL LAW (1983). This definition of contract has also been extended to the private business sector. Toussaint v. Blue Cross & Blue Shield of Michigan; Ebling v. Masco Corp., 292 N.W.2d 880 (Mich. 1980).

are involved. Contract questions concerning private schools appear to involve one of three kinds of problems:

(1) Whether allegedly improper student or faculty conduct is covered by published contract language;
(2) Whether the school has complied with its own contractual requirements in dealing with students or faculty;
(3) Whether the school's interpretation or enforcement of contract terms exhibited good faith and fairness.

The problem as to whether allegedly improper faculty or student conduct is covered by existing school contract language is really a problem with a number of different facets. Clearly one of the most common facets is the application of a general contrct term to certain conduct. In *Aronson v. North Park College*[36] the college catalog provided that:

> This institution reserves the right to dismiss at any time a student who in its judgment is undesirable and whose continuation in the school is detrimental to himself or his fellow students. Such dismissal may be made without specific charge.[37]

The student had further agreed in her application "to abide by all regulations of the institution."[38] The college catalog further provided that the counseling center partly funded by the college was "available to any student upon his request or referral."[39] When the dean of the college referred plaintiff to the counseling center upon threat of dismissal from the college and the dean was subsequently informed by one of the counseling center's psychologists that plaintiff was paranoid and a serious detriment to herself and others, the court found the general language of the catalog to cover plaintiff's condition. Courts in general appear to give great deference to the use of general contract language, even in the public sector.[40]

A different facet of the problem regarding the application of contract lagnuage to faculty and student conduct concerns the absence of express written contract language. Normally what are involved are unwritten school policies. In *Fiedler v. Marumsco Christian School*[41] a white female and black male student who were expelled for allegedly violating the school's religious based policy against interracial dating

36. Aronson, *supra* note 19.
37. *Id.* at 781.
38. *Id.* at 780.
39. *Id.*
40. PHAY, *supra* note 1 at 4-10.
41. 631 F.2d 1144 (4th Cir. 1980).

were ordered reinstated under section 1981 of the Civil Rights Act.[42] The federal appeals court found that the issue of race relations was not addressed at all in any of the church's writings—the statement of cooperation signed by parents of the schools students, the constitution and bylaws of the church and the statement of faith. The absence of any written rule or regulation made the verbal policy appear to be more of a personal preference than a religious conviction. The apparent absence of a religious conviction meant that the school was deprived of protection for its alleged religious belief under the free exercise clause. An identical result for similar reasons had earlier been reached in a different federal court of appeals.[43] In *Dolter v. Wahlert High School* the dfendant Catholic school's motion for summary judgment was denied when a pregnant, unmarried teacher brought a Title VII action against the school. In February, 1978 the plaintiff had notified the school's principal that she was pregnant and in March, 1978 her contract for the following year was renewed. In terminating plaintiff's contract in June, 1978 defendant school alleged that "it was entitled to impose upon its teachers a code of religious moral conduct and to expect them to follow, in their personal life and behavior, the recognized moral precepts of the Catholic Church."[45] The court did not dispute the school's right to enforce its moral code on its faculty but the absence of a clear statement on pre-marital sex had apparently resulted in inconsistency in enforcing the unwritten policy against male faculty whom plaintiff alleged had engaged in premarital sex but had not been discharged.[46] The absence of a clear written policy on an area considered important to a school can result in expensive, protracted litigation. In *E.E.O.C. v. Mississippi College*[47] the school's reliance upon an unwritten policy to give preference in hiring faculty to applicants of a particular religion resulted in the case being remanded to determine whether the college could present "convincing evidence that the challenged employment practice resulted from discrimination on the basis of religion,"[48] such discrimination being permissible under

42. 42 U.S.C. § 1981.

43. Brown v. Dade Christian Schools, Inc., 556 F.2d 310 (4th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978).

44. 483 F. Supp. 266 (N.D. Iowa 1980).

45. *Id.* at 271.

46. In an unreported federal district court case, a discharged female faculty member cohabitating with a man in a house next to the college president's house was awarded $45,000 in damages because she claimed that male faculty members who had carried on adulterous affairs had not been discharged. The school had no statement on such practices. Landphair v. Lynchburg College, No. 79-003-L (D. Del. 1980) (*See NOLPE NOTES*, Feb. 1981 at 2).

47. 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3964 (U.S. 1981).

48. *Id.* at 481.

Title VII. It would appear that religious, moral, and ethical values which a private school views as important to its educative functions should be put in writing. The absence of an express written policy can perhaps be overcome with proof that the discharged teacher or expelled student knew in fact what the unwritten policy of the school was, but that risk seems hardly worthwhile considering the time and money expended in litigation.[49]

Another facet of the problem pertaining to application of faculty or student conduct to school rules or regulations involves changes in school catalogs and inconsistencies within the same catalog. The apparent dearth of cases representing this facet of the problem undoubtedly reflects private schools' accommodation to resolve disputes involving changes and internal inconsistencies in favor of the student or faculty member. It can be readily anticipated that school intransigence in handling such changes or inconsistencies cannot be expected to meet with judicial favor. In *Blank v. Board of Higher Education of City of New York*[50] the court ordered Brooklyn College to confer upon the plaintiff the degree of bachelor of arts. This unusual judicial remedy was invoked because of the college's refusal to grant credit for courses taken at another institution. The court's rather heavy handed treatment of the college resulted from the school's reliance upon a newly added provision in the school catalog for the year following the one in which plaintiff should have graduated and upon one part of the catalog when other portions of the catalog made differing statements. Obviously such lawsuits results ought to be an embarrassment to any school and could well be avoided by carefully studying all school publications for internal consistency.

A second major problem area of contractual constraints concerns whether the private school has complied with its contractual requirements in dealing with students or faculty. It can reasonably be expected that if a school makes certain promises or commitments in its literature that courts will expect the school to fulfill those promises or commitments. However, courts will require that the disgruntled plaintiff satisfy minimum pleading requirements. In *Shields v. The School of Law, Hofstra University*[51] plaintiff's complaint was dismissed

49. In Bischoff v. Brothers of the Sacred Heart, 416 So. 2d 348 (La. Ct. App. 1982) the school's cancellation of plaintiff's contract was upheld only because plaintiff's educational background should have made him aware of defendant's religious position. A clear statement in the application or faculty handbook would have probably prevented this litigation.

50. 273 N.Y.S.2d 796 (N.Y. Sup. Ct. 1966). New catalog provisions cannot be applied retroactively if the catalog under which a student entered made certain promises that some catalog provisions would not be subject to changes. University of Texas Health Science Center at Houston v. Babb, 646 S.W.2d 502 (Tex. Ct. App. 1982).

51. 431 N.Y.S. 2d 60 (N.Y. Sup. Ct. 1980).,

because she failed to allege the provisions of the contract upon which her claim was based. Plaintiff attempted to argue that her reliance upon an assistant dean's statement, that if she rewrote a brief and received a higher grade her failing grade would not be counted in her GPA, caused her not to appeal the failing grade. The plaintiff did in fact receive a passing grade on the second brief but "consistent with its academic regulations as set forth in its bulletin, the school continued to count plaintiff's failing grade. . . ."[52] The court's conclusion in dismissing plaintiff's breach of contract claim is well worth quoting as an admonition to disgruntled students or faculty who attempt to translate their pique into some vague references to contractual unfairness, but with no citations to contract provisions.

> In the absence of any allegation of such a provision, there is no basis to conclude that the law school's decision with respect to these matters involved anything other than the exercise of sound academic discretion, unfettered by contract and unreviewable by courts.[53]

Courts appear not to be willing to deviate from a contract cause of action and allow plaintiffs to sue private schools for a cause of action which seems to be educational malpractice.[54] Courts have dismissed causes of action which have been based upon "quality of education" as being really attempts to sue for educational malpractice.[55] However, such courts point out that

> [i]f . . . a private school were simply to accept a student's tuition and thereafter provide no educational services, an action for breach of contract might lie. Similarly if the contract with the school were to provide for certain specified services, such as for example, a designated number of hours of instruction, and the school failed to meet its obligation, then a contract with appropriate consequential damages might be viable.[56]

Obviously then, any express promises or commitments, even those promising that a "student would reach a certain proficiency after pursuing certain studies,"[57] have a contract quality to them and would

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52. *Id.* at 61.
53. *Id.* at 63.
54. In the public sector education malpractice has likewise consistently been denied as a cause of action. Tubell v. Dade Cty. Pub. Schools, 419 So. 2d 388 (Fla. Dist. Ct. App. 1982); Hunter v. Board of Educ. of Montgomery Cty., 439 A.2d 582 (Md. 1982); D.S.W. v. Fairbanks North Star Borough School Dist., 628 P.2d 554 (Alas. 1981).
55. Paladino v. Adelphi University, 454 N.Y.S.2d 868 (N.Y. Sup. Ct. 1982); Pretro v. St. Joseph's School, 48 U.S.L.W. 2229 (U.S. 1979).
56. Paladino, *supra* note 55 at 873.
57. Pietro, *supra* note 55.

probably be acceptable as a contract cause of action. Private schools would be advised to examine carefully their promotional materials for contract-type language that the school is not, or cannot, fulfil.

Reliance by courts upon a contract relationship between private schools and their students and faculty does not necessarily prohibit schools from making adjustments in its policies. The recent case of *Marquez v. University of Washington*[58] illustrates the flexibility which is possible within a school's written policies. In *Marquez* the plaintiff relied upon the AALS prelaw handbook describing defendant's law school as having "Special Programs" including "academic aid . . . for students of minority ethnic groups."[59] Prior to plaintiff's first year in its school, defendant had a formal tutoring program but because of dissatisfaction with the tutors and concern with stigmatization, the program had been replaced by a voluntary assistance program. In response to plaintiff's allegation that defendant's handbook required a formal tutoring program the court noted that "the concept of a binding, absolute, unchangeable contract is particularly anomalous in the context of post-graduate work."[60] For private schools elementary through college it would likewise be difficult to function if every policy and regulation in effect at the beginning of the school year could be not altered or deleted or new rules added during the school year. Thus it is not unusual for handbooks or catalogs of private schools to contain a statement to the effect that "The college may alter, amend or abolish its rules or regulations at any time."[61]

The question still remains through whether there might be promises or commitments of such a nature that any alteration or amendment would constitute a breach of contract. In *Idrees v. American University of the Caribbean*[62] a student recovered $3940 actual damages and $8371 attorney fees on a theory of fraudulent misrepresentation. The defendant's medical brochure advertised the school's library facilities, classroom microscopes and skeletons, student slides, names of faculty members, and contained a picture of a nearby hospital. There was no statement in the brochure explaining that no relationship existed between the defendant and the hospital. In addition, through circumstances beyond the school's control, *e.g.*, delayed construction of advertised facilities and faculty defections, the school failed to advise incoming students of its changed circumstances. When the plaintiff demanded a full refund of his tuition, the school refused to comply.

58. 648 P.2d 94 (Wash. Ct. App. 1982).
59. *Id.* at 96.
60. *Id.* at 97.
61. 1982/1984 THE LIBERTY WAY 1 (Liberty Baptist College).
62. 546 F. Supp. 1342 (S.D.N.Y. 1982).

The *Idrees* case should not be interpreted to mean that a private school is potentially liable for misrepresentation in every situation if there are faculty changes or incompleted construction between the publication of the following school year's catalog and the beginning of that school year. Obviously the quality of faculty and the nature of facilities which are critical to medical school accreditation process if graduates are to be eligible for state licensure to practice medicine would not be as critical at the elementary and secondary level. In *Dizick v. Umpqua Community College*[63] a student recovered $12,500 in damages for promissory fraud and misrepresentation against a public community college. The student plaintiff had enrolled in a welding program at defendant school and received assurances from school personnel that he would receive advanced welding training in certain techniques on various machines. The school's catalog offered courses teaching those techniques. Unfortunately, during plaintiff's three consecutive terms in attendance at the school the equipment necessary to teach the techniques was either inoperable or had been on order for a considerable period of time and had not arrived. To put *Dizick* and *Idrees* cases into perspective as to when catalog, brochure or handbook inaccuracies are most likely to present misrepresentation or breach of contract problems, the following conditions would probably have to be satisfied:

(1) The alleged inaccuracies would have to deal with curriculum, and probably course offerings within a program and course content in particular; and,
(2) The student must demonstrate that he has made some kind of expression of course or program objectives he expects from the course or program and has received the instructor's assurance that those objectives will be addressed in the course content or the program in general; and,
(3) There is some form of objective professional or vocational standard that a student completing the course or program would have to comply with, *e.g.*, vocational or professional licensure.

In order for a student to maintain a breach of contract or misrepresentation he must allege some damage and it is difficult to envision inaccuracies, other than the kinds in the *Dizick* and *Idrees* cases, receiving serious consideration from courts.[64]

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63. 599 P.2d 444 (Or. 1979).

64. Even though a school does not follow its own published procedural requirements in a discipline case, the student should not have cause of action as long as there was a subsequent review hearing that met the requirements. *See* Turof v. Kibbee, 527 F. Supp. 880 (E.D.N.Y. 1981).

The third major problem area of contractual constraints concerns whether a private school's interpretation and enforcement of its contract terms demonstrates good faith and fairness. It is possible that even though a private school has a specific provision addressing the faculty or student conduct at hand the school might lose if its enforcement of the provision appears to be done in bad faith. In the *Aronson* case referred to earlier[65] the application of general standards to student misconduct does not in itself represent bad faith. The *Aronson* court concluded that "in view of the information presented to the college authorities . . . it was incumbent upon them as part of their duties to effect a separation of plaintiff from the college."[66]

A persistent enforcement problem of all schools concerns differences among the severity of penalties imposed upon offenders of school rules. In *Napilatano v. The Trustees of Princeton University*[67] the court observed that the fact plaintiff was an excellent student and that in twenty or more disciplinary cases no one had been penalized as severely "is totally irrelevant because each penalty obviously must be tailored to the offense committed and the offense committed must be viewed with regard to the offender and the community."[68] The plaintiff had the awarding of her diploma delayed from June 1982 to June 1983 because of plagiarism on a course term paper and even though the judge was troubled by the severity of the penalty he could not "substitute his own views for those of a duly constituted administrative body within a private institution."[69] However, even though courts will grant considerable deference to private schools to design appropriate penalties, there must be some general element of predictability to whether certain

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65. *See* text accompanying notes 36-39, *supra*.

66. Aronson, *supra*, note 19 at 782. There is a troublesome aspect of *Aronson* not addressed by the court because apparently plaintiff would have to sue the counseling center rather than the college, viz., whether the center as an entity separate from the college breached a duty of confidentiality to the student by reporting the student's mental condition to the college. For private schools that maintain counseling services the problem of how to handle the relationship between treatment and discipline may involve aspects of contract, professional ethics, and federal privacy act requirements. In *Aronson* the college catalog advertised the counseling center and declared that "students may be assured of the confidentiality of these interviews at the center." Without some form of notice to and consent by students or a professional ethical requirement to report, it would seem that such counseling centers might be liable. Officials of private schools with counseling centers would do well to read Tarasoff v. Regents of University of California, 131 Cal. Rptr. 14 (Cal. 1976) and S. ERICSSON, CLERGY MALPRACTICE: CONSTITUTIONAL AND POLITICAL ISSUES, (1981).

67. 453 A.2d 263 (N.J. Super. Ct. App. Div. 1982). The student handbook of rules did not mention withholding of a degree as a penalty but it did list suspension and expulsion and the court treated the penalty imposed as "a less severe variation of suspension." at 276.

68. *Id.* at 278.

69. *Id.* at 277.

kinds of conduct will result in a severe penalty. Obviously the most severe penalty a school can impose is expulsion, termination or some form of forced withdrawal, and it appears to be this type of situation the courts examine with the most intense scrutiny. In *Heisler v. New York Medical College*[70] plaintiff was dismissed because she had failed four courses during her first year even though three other students, some with more failures and weaker excuses, were not. In ordering the student reinstated the court observed that,

> when a school deviates from its rules and makes exceptions thereto, it must employ some understandable, unified standards. The failure to establish and maintain such standards constitutes an impermissible abuse of discretion and a lack of good faith on the part of the educational institution.[71]

Plaintiff's case in *Heisler* was undoubtedly aided by the apparent fact that all four students were dealt with at the same time. Handling discipline problems from one year to the next or even from semester to semester normally do not have the same close association in time and fact situations. The closer in time and fact situation that discipline problems occur the greater the necessity for clear standards to explain differences among penalties for different students.

It is possible that a faculty member or student's bad faith may serve to tip the balance in favor of the school in a close case where the school's standards have not been clearly expressed. In *Bischoff v. Brothers of the Sacred Heart*[72] a new teacher whose contract with defendant was cancelled prior to the beginning of the school year failed in his breach of contract suit. Under the category of "Religion" plaintiff had checked off "Practicing Catholic: Yes" and under "Marital Status" he noted "Married." Defendant claimed subsequent knowledge of plaintiff's divorce and remarriage was the reason for the contract cancellation even though this apparent aspect of Catholic doctrine was not discussed at plaintiff's interview. Plaintiff responded that defendant had three divorced faculty members but defendant replied that plaintiff was hired to teach religion and the standard for religion teachers was different from other teachers. In deciding this close case for defendant, the court relied upon plaintiff's background of six years in a Catholic seminary and graduate program and plaintiff's assertion at trial that "he didn't divulge his marital history because he knew Brother Farrel would not have hired him under those circumstances."[73]

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70. 449 N.Y.S.2d 834 (N.Y. Sup. Ct. 1982).
71. *Id.* at 837.
72. 416 So. 2d 348 (La. Ct. App. 1982).
73. *Id.* at 351.

The court found that plaintiff had "intentionally concealed his marital status" and assessed all court costs against plaintiff.

A final problem concerning whether a private school's interpretation or enforcement of its rules represents good faith pertains to faculty communication to students or administrator's statements to faculty that apparently vary from the rules. As noted earlier in *Shields*[75] the burden of proof is on plaintiff student or faculty member to allege and be able to prove the content of the communication and that he reasonably relied upon that communication to his detriment. However, as in the case of *Shields* where a written regulation already exists, a plaintiff would seemingly have a greater burden to demonstrate the reasonableness of his reliance. It may well be that the higher in the administrative heirarchy the source of the communication the more reasonable would be the reliance. But mistakes in communication have occasionally been the source of lawsuits. In *Olsson v. Board of Higher Education*[76] defendant school was not required to award a diploma to plaintiff who had relied upon a faculty member's unfortunate and unintentional mistatement about the number of comprehensive examinations that had to receive a passing grade. The court observed that normally a principal must answer for the statements of his agent "when the latter is clothed with a mantle of apparent authority."[77] However, the court further noted that it is reluctant to intervene in controversies involving academic standards if society is to "have complete confidence in the credentials dispensed by academic institutions."[78] In this case the court found for defendant school because its offer to plaintiff to allow him to retake the comprehensive examination he failed constituted an act of good faith. in comparing *Blank* and *Olsson* it would appear that a misstatement by a member of the faculty or administration, and reasonably relied upon by a student or faculty member, concerning a matter on which there is no clear noncontradictory rule or regulation requires the school at least to make some effort to remediate the inconvenience or harm done. Clearly the amount of effort by a student or faculty member harmed by the misstatement to correct the effects of the misstatement appears to be important. Allowing a student to retake entire courses as in *Blank* is obviously more egregious than simply retaking an exam as in *Olsson*. To some extent this entire problem area can be reduced if key policies are

74. *Id.*
75. *See* text accompanying notes 51-53, *supra*.
76. 402 N.E.2d 1150 (N.Y. 1980).
77. *Id.* at 1152.
78. *Id.* at 1153.

committed to writing and verbally stated to faculty and students at the beginning of each school year.[79] The younger the student, and perhaps the more inexperienced the faculty member, the greater the likelihood that he will tend to rely upon the oral statements of those in superior positions. The reason that more cases of record involving problems of this nature do not appear is undoubtedly a testimony to the reasonableness and flexibility of faculty or administrators to make accommodations for their errors.

While courts will normally not interfere with the clear contractual relationship between a student and a nonpublic school as reflected in the terms of the school's catalog, it is possible that certain catalog provisions may be rendered inoperative if a contravening public policy is at issue. For example, in *In re Parkman*[80] a private college was prohibited from discontinuing a student from the college because the student would not accelerate her payments for past tuition arranged under a Chapter 13 debtor's plan.[81] Although the *Parkman* court noted that Section 525 of the Bankruptcy Code prohibiting taking actions based on the filing of bankruptcy normally does not apply to private institutions because state action is required, "where the actions of a private institution such as withholding a transcript are really tools to collect a discharged debt or a debt provided for under a plan, debtors are denied the fresh start contemplated by Congress enacting the Bankruptcy Code."[82] However, even if the statute of limitations has run so that a school cannot collect a past due bill, the school should still be able to withhold transcripts as leverage to collect the unpaid debt.[83]

Recommendations

In summarizing this chapter on student and faculty discipline a number of suggestions can be offered to hopefully serve as a prophylaxis against future litigation.

(1) Parties to an employment contract would do well to discuss general or ambiguous terms, *e.g.*, "other assigned duties" prior to signing. If a new teacher is to be excluded from certain kinds of duties it would be preferrable to note such on the contract.

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79. While not relevant in every private educational setting some administrators have a meeting of all faculty and secondary students on the first day of school and cover the key rules.
80. 27 Bankr. 460 (Bankr. N.D. Ill. 1983).
81. 11 U.S.C. § 362(a),(6), 1301.
82. *In re* Parkman, *supra* note 80 at 462.
83. *See* Spas v. Whorton, 431 N.Y.S.2d 638 (N.Y. Sup. Ct. 1980).

(2) Any special service requirements or type of conduct considered important by private schools should be clearly spelled out in faculty and student handbooks. Such requirements do not normally need to be included in the body of a teacher's contract since the contents of the faculty handbook can simply be incorporated by reference into the contract with one simple sentence.
(3) Since private schools normally reserve the right to discharge faculty or expel students who do satisfy the school's requirements, it is important that faculty and student handbooks contain a list of punishable offenses, the kind of punishments appropriate for the different offenses, and a review procedure beyond the discipline decision of person who made the initial discipline decision.
(4) Because of federal anti-discrimination implications and because of the changing nature of contract law, it would be advisable to have the school's faculty and student handbooks, as well as faculty contract, reviewed on an annual basis by competent legal counsel. In addition the school's faculty hiring, grievance, evaluation, promotion and termination policies, as well as student admission, grievance and review policies, should be examined on an annual basis.

3

Governing Board Liability

Introduction

The personal liability of members of governing boards of nonpublic educational institutions has generated relatively little litigation or literature when compared with the public sector.[1] This relative absence of case law or commentary can probably be attributed to a number of factors: less likelihood by clientele to sue private schools; a frequently much-diminished rule of nonpublic school boards in actual governance; and the greater visibility of administrators as the actual source of policy as well as day-to-day decision making. Nonpublic elementary and secondary schools, especially those with religious affiliations, tend to be very much hieirarchal in administration with governing boards providing essentially advisory functions. Although governing boards of postsecondary institutions frequently have more authority in school decisions the geographical separation of board members often makes board meetings on other than an annual or semi-annual basis difficult for some members to attend. It is not uncommon for boards to delegate more frequent governance decisions to executive committees composed of board members who are able to meet at more frequent intervals. Although executive committees are generally predominantly composed of line administrators there are also usually several board members who are not administrators.

The infrequency of lawsuits against nonpublic board members should not anesthetize those who accept such positions to what are the legal expectations for their responsibilities. The minimum responsibilities for board members are:

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1. In Wood v. Strickland, 420 U.S. 308, 322 (1975) the United States Supreme Court decided that public school board members could be individually liable under section 1983 of the Civil Rights Act according to "a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges." *See Wood v. Strickland: liability of school board members for damages resulting from a deprivation of a student's civil rights*, 13 CAL. W. L. REV. 153 (1976-77); R. STERN, *Wood v. Strickland: The Aftermath*, 8 URBAN LAW 885 (1976). The absence of sufficient involvement between a private educational institution and a state immunizes private schools from section 1983, Rice v. President and Fellows of Harvard College, 663 F.2d 336, *cert. denied*, 102 S. Ct. 1976 (1982).

(1) To attend meetings of the board and committees;
(2) to examine financial statements of the institutions;
(3) to acquire working knowledge of institutional policies;
(4) to make inquiries;
(5) to discharge responsibilities in a reasonable, prudent and informed manner.[2]

Fiduciary Relationship

Board membership is a fiduciary relationship and any business dealings between a board member and his institution will be examined with the greatest scrutiny. The allegations from plaintiff's complaint in *Gilbert v. McLeod Infirmary*[3] illustrate the type of dealings between a board member and his institution which can result in any of such dealings being rendered voidable at the option of the institution's officers, minority board members in the transaction, or even the institution's employees. In *Gilbert* the actions which resulted in a sale of institutional property to a board member being set aside were:

(1) The attendance and activity of the purchasing board member at the meeting where the transaction was considered;
(2) profit to the board member and potential or actual present or future loss to the institution;
(3) consideration of less than two-thirds of the fair market value;
(4) authorization of the transaction at an irregular board meeting with ratification at a subsequent board meeting advocated by the purchasing board member;
(5) failure to satisfy the notice requirement imposed by the corporation's constitution.[4]

Even though the *Gilbert* court found no "actual fraud or fraudulent intent"[5] the court set aside the board member's purchase because "his conduct failed to measure up to the high standard required by the law of one in his fiduciary relation. . . ."[6] Although a board member is not prevented from dealing with his own nonprofit institution, he bears the burden of proof that he made full disclosure regarding his purchase, paid full value and imposed no burden upon the institution. The

2. LEGAL DESKBOOK FOR ADMINISTRATORS OF INDEPENDENT COLLEGES AND UNIVERSITIES (K. WEEKS, ed. 1982) at III-7.
3. 64 S.E.2d 524 (S.C. 1951).
4. *Id.* at 527, 531.
5. *Id.* at 531.
6. *Id.*

Gilbert court concluded that the doctrine is firmly established that "a person occupying a place of trust should not put himself in a position in which self-interest conflicts with any duty he owes to those for whom he acts."[7]

Business Dealings with Institutions

The responsibility of board members to exhibit fair dealing and loyalty in transactions with their nonpublic institutions was very well stated in the recent case of *Stern v. Lucy Webb Hayes National Training School for Deaconesses and Missionaries.*[8] Because *Stern* respresents the all-too-common situation in nonprofit institutions where there is a dominant administration and relatively passive board members, the facts as well as the law of this case are especially important. In *Stern* a hospital board of 25 to 35 members was required by their bylaws to meet at least twice a year but between meetings the board was to be represented by an executive committee. In addition the board created a finance committee to review the budget and report on the cash available for investment. However, for approximately twenty years the board and its committees were dominated by two trustee officers, the hospital administrator and the treasurer. Not until the deaths of both men did the other trustees appear to have assumed an identifiable supervisory role over investment policy and hospital fiscal management in general.

Plaintiffs in *Stern* were patients of the hospital who brought a class action challenging various aspects of the hospital's fiscal management. Plaintiffs essentially alleged two causes of action: (1) Hospital board members who were also board members of banks or investment firms conspired to enrich themselves and their financial businesses by favoring those businesses in financial dealing with the hospital; (2) hospital board members breached their fiduciary duties of care and loyalty in the management of hospital funds.

Plaintiffs sought to substantiate their claims with the following facts:

(1) the hospital maintained much of its liquid assets in savings and checking accounts rather than in treasury bonds or investment securities;
(2) most investment funds were deposited in the financial institutions with which the hospital board members were involved;

7. *Id.* at 530.
8. 381 F. Supp. 1003 (D.S.C. 1974).

(3) a yearly audit was prepared for the board members but they rarely if ever read the details and approved the treasurer's investment recommendations as a matter of course;
(4) none of the board members attempted to force their views upon the treasurer who considered their suggestions as interference;
(5) renegotiation of a mortgage with board members' financial institutions;
(6) signing an investment advisory agreement with one of the board member's investment firms.

The court found no evidence to support plaintiff's conspiracy claim. Although, as the court observed "defendants were able to offer no adequate justification for utilization of the hospital's assets"[9] there was no evidence of board members' directions or encouragement of the treasurer's favoritism for defendants' financial institutions; there was no evidence that mortgage terms or investment fees were unreasonable; there was no evidence that the financial institutions had any contact among themselves relating to the handling of the hospital's business; and there was no evidence that any of the board members solicited business for his own financial institution.

Standard of Care

However, the court responded differently to plaintiff's breach of duty claims of mismanagement, nonmanagement and self-dealing. In determining whether the board members had breached their duty to the hospital, the court had first to consider what the legal standard of care ought to be. The court distinguished between trustees who manage charitable trusts and directors who manage charitable corporations.[10]

> Both trustees and corporate directors are liable for losses occasioned by their negligent mismanagement of investments. However, the degree of care required appears to differ in many jurisdictions. A trustee is uniformly held to a high standard of care and will be held liable for simple negligence,[11] while a director must often have committed 'gross negligence' or otherwise be guilty of more than mere mistakes of judgment.[12]

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9. *Id.* at 1010.
10. For a discussion of the difference between charitable trusts and corporations *see* G.G. BOGART & G.T. BOGART, HANDBOOK OF THE LAW OF TRUSTS (5th ed. 1973) at 245-46. *See also*, Corcoran v. Rockwell, 410 A.2d 202, 205 (D.C. Cir. 1979).
11. Attempts by the settlor to reduce the amount of skill and prudence required of the trustee through appropriate exculpatory language often meet with judicial hostility. *See* BOGART, *supra*, note 10 at 339-343.
12. *See*, *supra*, note 8 at 1013.

Where funds are managed by a charitable corporation or where funds are left to a charitable corporation, "by the better view, no trust in the strict sense is created."[13]

But even if nonprofit institution board members are "held to the less stringent corporate standard of care" and "are required to exercise ordinary and reasonable care in the performance of their duties, exhibiting honesty and good faith"[14] the court in *Stern* made the following statements of law regarding the responsibilities of corporate board members:

(1) Corporate board members can delegate investment decisions to committees "so long as all directors assume the responsibility for supervising such committees by periodically scrutinizing their work";[15]
(2) a corporate board member who fails to supervise or even attend board meetings "has violated his fiduciary duty to the corporation."[16]
(3) while a corporate board member may rely upon the expertise of corporate officers, such reliance is no excuse for dispensing with or ignoring officer reports;
(4) a corporate board member who permits negligent mismanagement by others to go unchecked "has committed an independent wrong against the corporation; he is not merely an accessory under an attenuated theory of *respondeat superior* or constructive notice."[17]
(5) a corporate board member "should not only disclose his interlocking responsibilities but also refrain from voting on or otherwise influencing a corporate decision to transact business with a company in which he has a significant interest or control."[18]

Although the court in *Stern* dismissed the complaint against defendant financial institutions, rejected all claims of conspiracy, and refused to cancel the disputed mortgage, the court found the defendant board members to have breached their duties of care and loyalty to the

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13. Midatlantic National Bank v. Frank G. Thompson, Foundation, 405 A.2d 866 (Pa. Super. Ct. 1979).
14. *Supra*, note 8 at 1013.
15. *Id.*
16. *Id.* at 1014.
17. For a thorough discussion of corporate board member or director liability for acts of a codirector or officer *see* W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS (1975) § 1065.
18. *See, supra*, note 8 at 1014; *supra* note 3. *See also* W. Porth, *Personal Liability of Trustees of Educational Institutions*, 1 J.C.U. LAW 84, 87 (1973).

hospital and ordered the board to enact and implement certain policies to prevent future conflicts.[19]

Areas of Vicarious Liability

Board members have occasionally been found personally liable in cases other than financial dealings. In *Gamble v. Vanderbilt University*[20] members of the executive committee of a private university charged with the supervision of an office building owned and operated by the university, were liable to a person injured in the fall of an elevator in the building for their misfeasance in permitting the elevator to be operated when they knew it was unsafe. In *Love v. Nashville Agricultural and Normal Institute*[21] the manager of a private normal school which committed a nuisance by polluting an adjoining landowner's water supply were held personally liable even though they did not purposely commit the wrong and merely acted as agents of the school. In *Jones v. Jones*[22] the owner and director of a day care facility was found personally and solely liable when one of her employees left on the serving tray a container of hot food which spilled on two-year-old plaintiff, despite defendant's explicit instruction to her employees that to leave food on a serving tray from which food was served would be in violation of the rules. Occasionally board members of educational institutions have been sued where they have refused to ratify or have altered employment contracts negotiated by the school's administrator. Such lawsuits are generally unsuccessful because persons negotiating employment arrangements with a school administrator are presumed to know that such arrangements are not final until approved by the governing board.[23]

Indemnification

Since most board members of nonprofit educational institutions generally consider their duties to be a charitable service and serve

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19. An enumerated summary of the courts declaratory order can be found at W. Porth, *Personal Liability of Trustees of Educational Institutions*, 2 J.C.U. LAW 143, 152-53 (1974-75).

20. 200 S.W. 510 (Tenn. 1918).

21. 243 S.W. 304 (Tenn. 1922).

22. 168 S.E.2d 883 (Ga. Ct. App. 1969). The standard of care for the director's vicarious liability appeared to be the same as if she had been personally involved. "Children of tender years are entitled to that degree of care proportioned to their ability to foresee and avoid perils that may be encountered." (*Id.* at 885).

23. *See* Pelotte v. Simmons, 152 S.E. 310 (Ga. Ct. App. 1930).

without compensation, it is not unreasonable that many such institutions may want to indemnify board members against any liabilities incurred by reason of their service. However, such indemnification will be limited by the charter or bylaws of the corporation or separate agreement with the board members, subject in all cases to whatever further limitations the statutes or decisions of the jurisdiction of incorporation may impose. The Model Business Corporation Act which has been adopted in at least half the states permits indemnification for a board member if

(1) He conducted himself in good faith; and
(2) he reasonably believed (a) in the case of conduct in his official capacity with the corporation, that his conduct was in its best interests, and (b) in all other cases, that his conduct was at least not opposed to its best interests; and
(3) in the case of any criminal proceeding, he had no reasonable cause to believe his conduct was unlawful.[24]

The Model Act prohibits indemnification in situations where a board member "shall have been adjudged to be liable on the basis that personal benefit was improperly received by him,"[25] where limited by the articles of incorporation[26] or where rejected by a court of appropriate jurisdiction.[27] Board members need to check carefully statutes regulating nonprofit corporations in their own states because some states have limited the right of nonprofit corporations to indemnify board members beyond the limitations in the Model Act.[28]

Liability Insurance

It can probably be assumed that all nonprofit educational corporations have purchased liability insurance to protect board members against personal liability and that the coverage is as broad as necesary in dollar amount and activity covrage commensurate with the scope of the corporation's functions. However, insurance protection would not

24. MODEL BUS. CORP. ACT § 5(a)(6) (1980 amendment).
25. *Id.* at § 5(c).
26. *Id.* at § 5(d).
27. *Id.*
28. *E.g.*, New York prohibits indemnification where an "officer or director is adjudged to have breached his duty to the corporation" by failing to discharge his duties "in good faith and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions." N.Y. NOT-FOR-PROFIT CORP. LAW § 717, 722 (McKinney 1970). The New York statute is exclusive in that it specifically declares invalid any bylaw or other provision for indemnification of officers and directors which is not consistent with the statute (*Id.* at § 721).

apply to situations where state law prohibits indemnification and it is questionable that a nonprofit institution could authorize and properly expend its funds to provide insurance protection beyond those areas for which it is authorized to indemnity.[29] In some states nonprofit corporations are permitted to purchase insurance coverage beyond the indemnification permitted by statute.[30] Obviously each nonprofit educational institution needs to review carefully its own insurance coverage in light of applicable state law.

29. Porth, *supra* note 18 at 90.
30. *See, e.g.*, N.Y. NOT-FOR-PROFIT CORP. LAW § 727 (McKinney 1970).

4

Governmental Regulation of Nonpublic Schools

Basis for State Regulation

The range of nonpublic schools in the United States is considerable, from home instruction by parents of their own children to prestigious private schools, with or without religious affiliations.[1] The rate of growth of nonpublic schools in the past several years has apparently been substantial, with much of the growth occurring in schools with a religious affiliation.[2] Regardless of the nature of a nonpublic school, all such schools have a common basic concern for parental control of the forum of education.[3] In response to parental desires for education of their children, nonpublic schools have designed programs to address the needs of their student clientele.[4]

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1. The wide variation in designation as private, parochial or Christian Day School does very often convey distinctions in organization and administration. *See* R. RUSHDOONY, INTELLECTUAL SCHIZOPHRENIA 107 (1973).

2. In an age of expected lower enrollments of students to be served by schools it is clear that most of the decline is expected in the public sector. *See* N. DEARMAN & V. PLISKO, CONDITIONS OF EDUCATION 44 (1980). In the private sector, however, enrollment is expected to remain fairly constant with some of the religious schools which comprise 85 percent of the private school movement showing dramatic increase, *e.g.*, member schools of Association of Christian Schools International have increased from 1051 in 1978 to 1482 in 1980-81 and combined student enrollment for the same period has jumped from 185, 687 to 289,001. ACSI Int. Newsletter, March 1981 at 2.

3. It should not be presumed that it is universally accepted that parental choice should be the final determiner in placing a child in a nonpublic school. In his famous dissent in Wisconsin v. Yoder, 406 U.S. 205 (1972) Mr. Justice Douglas observed: "While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views.... It is the student's judgment, not his parents that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be master of their own destiny. (*Id.* at 245, 246)." *Contrast* the views of Justice Douglas *with* those of a prominent expert witness for nonpublic schools: "The destinies of the young will often be misguided by parents, but this state seems far less lethal than the alternative of giving government the ultimate power of indoctrination." D. ERICKSON, PUBLIC CONTROLS FOR NONPUBLIC SCHOOLS 56 (1969).

4. *See* O. KRAUSHAAR, AMERICAN NONPUBLIC SCHOOLS 6-8 (1972) where a variety of distinctives for nonpublic schools are referred to. Where one of the needs parents wish to provide is religious instruction the nonpublic sector may be the only forum in which such a need can be met. The use of public schools for religious purposes has been affirmed in Widmar v. Vincent, 102 S. Ct. 269 (1983) (colleges) but denied in Brandon v. Board of

To the extent that the education market in general could operate according to free enterprise supply and demand economic principles, it might be possible to secure a fairly accurate index of student needs as related to the cost for supplying those needs.[5] However, the massive public education system in the United States supported by local property taxes and a variety of state tax sources has made the determination of costs of educational services in the general education market difficult to assess and the availability of special educational services in the nonpublic educational area difficult for many to obtain financially.[6] With state commitments to preservation of their public educational system have come a wide variety of approaches to maintaining the quality of education within a state.[7]

In *Pierce v. Society of Sisters*[8] the United States Supreme Court prohibited a state from controlling the quality of education by requiring attendance at public schools. Although frequently cited as establishing the legal right of parents to direct the education of their children[9] the United States Supreme Court has stressed recently the limited scope of *Pierce* "which simply affirmed the right of private schools to exist and to operate."[10]

However, the right of nonpublic schools to exist and operate does not presume a right to be free of government regulation. In *Pierce* the Court stated that "no question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils."[11] For the nonpublic school the

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Educ. of Guilderland, 487 F. Supp. 1219 (N.D.N.Y. 1980), *aff'd*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1982) (elementary and secondary). However, a religious club in a public high school was upheld on free speech grounds in Bender v. Williamsport Area School Dist., 563 F.2d 697 (M.D. Pa. 1983). For a discussion of this area, *see* R. Mawdsley, *Public Schools and Religious Activities*, 9 WEST'S EDUC. LAW REP. (1983).

5. An excellant discussion of the desirability and feasibility of administering education on a free enterprise model is found in E. WEST, NONPUBLIC SCHOOL AID (1976). A pointed question by E. West, "Are we more egalitarian than libertarian?" reflects the economic tensions between the state supported public educational system and the largely privately financed nonpublic system. *Id.* at 53.

6. Tax deductions which are now permissible for tuition, textbooks and transportation offer nothing in the way of financial resources for those who cannot afford the initial dollar investment in private education. *See* Mueller v. Allen, 103 S. Ct. 3062 (1983).

7. Control of the quality of education within a state has repeatedly been held to be a state function, Meyer v. Nebraska, 262 U.S. 360 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1972). In San Antonio v. Rodriguez, 411 U.S. 1 (1973) the United States Supreme Court rejected a claim that education was a fundamental constitutional right thus permitting Texas to allow local school districts to finance education at significantly diverse amounts.

8. 268 U.S. 510 (1925).

9. *Id.* at 534; Wisconsin v. Yoder, 406 U.S. 205, 233 (1972).

10. Runyon v. McCrary, 427 U.S. 160, 177 (1976).

11. Pierce at 534.

critical question is the extent to which a state legislature or administrative agency can regulate such schools out of existence when they cannot be legislated out of existence.

The broad range of nonpublic schools from those with well defined religious affiliations to those with no religious identification as well as wide variations in admissions, discipline, organization and administration policies and procedures make specific universally applicable principles difficult to assert.

Schools with a Religious Nexus

Of all the differences among nonpublic schools it would appear that the existence or nonexistence of a religious nexus is most important in assessing the degree to which a state can regulate the operation of a nonpublic school. In *Wisconsin v. Yoder*[12] the Supreme Court developed a threefold test under the Free Exercise of Religion Clause to resolve conflicts resulting from state attempts to regulate religious educational institutions: (1) whether or not the activity interfered with the state is motivated by an rooted in a legitimate and sincerely-held religious belief;[13] (2) whether or not the parties' free exercise of religion has been burdened by the regulation and the extent or impact of their religious practices;[14] (3) whether or not the state has a compelling interest in the regulation which justified the burden on free exercise of religion.[15] More recently the United States Supreme Court has suggested that the first amendment's establishment clause may also be invoked to prohibit governmental intrusion into matters pertaining to a religious educational institution's religious mission. In *National Labor Relations Board (NLRB) v. Catholic Bishop of Chicago*[16] the United States Supreme Court refused to require Roman Catholic schools to permit representation elections to be held for their lay teachers because subsequent negotiation of terms and conditions of employment would involve the NLRB in "nearly everything that goes on in the schools."[17] Although the Court resolved *Catholic Bishop* on other than constitutional grounds, it suggested that inquiries into the practices of religious schools that did not "go beyond resolving factual issues" might be

12. 406 U.S. 205 (1972).
13. *Id.* at 215-216.
14. *Id.* at 217-219.
15. *Id.* at 219-234. How the threefold test relates to the actual distribution of burden of proof is explained in R. Mawdsley & S. Permuth, *State Regulation of Religious Schools*, 11 NOLPE SCHOOL L.J. 55, 62-64 (1983).
16. 440 U.S. 490 (1979).
17. *Id.* at 502-503.

permissible.[18] But where the inquiry would involve conclusions to be drawn regarding "the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission" the process of inquiry as well as the conclusions drawn "may impinge on rights guaranteed by the Religion Clauses."[19]

Schools Without a Religious Nexus

Where a nonpublic educational institution does not have a religious nexus, there are fewer limitations upon governmental intrusion into the operation of a school. In *Runyon v. McCrary*[20] the United States Supreme Court decided that section 1981 of the Civil Rights Act[21] was applicable to "private, commercially operated nonsectarian schools."[22] Citing *Pierce* for the principle that "the State [can] reasonably ... regulate all schools"[23] the court appears to be declaring that a nonpublic, nonsectarian school's property interest is limited to a rational legislative purpose. Where a reasonable legislative purpose can be demonstrated, such as the elimination of racial segregation in all sectors of society, such a purpose would sustain the applicability of a statute now to even nonpublic, sectarian schools.[24] However, even though the property rights of nonpublic, nonsectarian schools would appear to be subject to regulation with less effort, courts have been

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18. *Id.* at 502.

19. Unfortunately, the interrelationship between the establishment clause and a religious educational institution was not resolved in Bob Jones University v. United States, 478 F. Supp. 890 (D.S.C. 1978), *rev'd*, 639 F.2d 147 (4th Cir. 1980), 103 S. Ct. 2017 (1983). The Supreme Court did observe recently in another case that a state "could conclude that there is a strong public interest in assuring the continued financial health of private schools, both sectarian and non-sectarian." Mueller, *supra* note 6 at 3064. For a thorough discussion of the policy implications of the *Bob Jones* case, *see* R. MAWDSLEY, *Bob Jones University v. United States: Public Policy and Religious Educational Institutions*, 1 WEST'S EDUC. LAW REP. 745 (1982).

20. Runyon, *supra* note 10.

21. Title 42 U.S.C. § 1981 provides in part that "all persons within the jurisdiction of the United States shall have the same rights in every State ... to make and enforce contracts ... as is enjoyed by white citizens...."

22. Runyon v. McCrary, 427 U.S. 160, 168 (1976).

23. Pierce at 534.

24. Runyon at 162. The Court specifically excluded from the applicability of this decision "the right of a private school to limit its student body to boys, to girls, or to adherents of a particular religious faith...." The Court swept aside constitutional arguments based on freedom of association, parental rights and right of privacy because "while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation." *Id.* at 166. *See* Bob Jones Univ. v. United States, 103 S. Ct. 2017 (1983) where fundamental public policy violations can result in governmental sanctions.

somewhat protective of such schools. In *State v. Williams*[25] the North Carolina Supreme Court held that state's regulation of certain kinds of private schools outside the state that solicit students within the state was an unwarranted delegation of legislative power. In *Nova University v. Board of Governors*[26] the North Carolina Supreme Court rejected a claim by the Board of Governors of the University of North Carolina that it establish minimum criteria for outside-of-state private schools because the board had neither the express nor implicit authority to regulate in-state or out-of-state private schools. In *McMinn v. City of Little Rock*[27] a local zoning commission was upheld in refusing to grant a zoning variance to a proposed Montessori school because there was no evidence that the commission acted "arbitrarily, capriciously and unreasonably."[28] In *Grigg v. Commonwealth of Virginia*[29] the Virginia Supreme Court upheld the Virginia compulsory attendance which classified private schools different from home instruction. Defendant parents were convicted of truancy because they did not have a certified teacher teaching their children at home whereas private schools in Virginia are not required to use certified teachers.[30] However, in *State of Wisconsin v. Popanz*,[31] the Wisconsin Supreme Court held that "private school"[32] as used in compulsory school attendance law was impermissibly vague under the due process clause[33] and thus the law as applied to prosecutions involving private schools was unconstitutional.

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25. 117 S.E.2d 444 (1960).
26. 287 S.E.2d 872 (N.C. 1982).
27. 631 S.W.2d 288 (Ark. 1982).
28. *Id.* at 291.
29. 297 S.E.2d 799 (Va. 1972).
30. The pattern of interpretation among states in the home instruction area is by no means consistent. One state may consider home instruction to be a "private school" whereas another will not. *Cf.* People v. Levisen, 90 N.E.2d 213 (Ill. 1950) and State v. Edgington, 663 P.2d 376 (N.M. Ct. App. 1983) with State v. Superior Ct., 346 P.2d 999 (Wash. 1960), State v. Lowry, 383 P.2d 962 (Kan. 1963), State v. M.M., 407 So. 2d 987 (Fla. Dist. Ct. App. 1982), and State v. Bigelow, 334 N.W.2d 444 (Neb. 1983). Where a state compulsory attendance statute requires only "equivalent instruction" there is a difference of opinion whether home instruction is equivalent to public education. *Cf. In re* H., 357 N.Y.S.2d 384 (N.Y. 1974) (equivalency rejected) *with* State v. Massa, 231 A.2d 252 (N.J. Cty. Ct. 1976) (equivalency upheld). Generally the burden is on the parent to prove equivalency but at least two states place the burden on the state. *See* Wright v. State, 209 P.179 (Okla. 1922); State v. Cheney, 305 S.W.2d 892 (Mo. 1957); State v. Pilkinton, 310 S.W.2d 304 (Mo. 1958); State v. Davis, 598 S.W.2d 189 (Mo. 1980). For a general discussion of the home instruction area *see* H. Punke, *Home Instruction and Compulsory School Attendance*, 5 NOLPE SCHOOL L.J. 77 (1975). At least one state, South Dakota, has reduced significantly obstructions to home instruction. *See* South Dakota CODIFIED LAWS ANN. § 13-27-2 (1982).
31. 332 N.W.2d 750 (Wis. 1983).
32. WIS. STAT. § 18.15(1)(a) (1981-1982).
33. WIS. CONST. art. I, § 8; U.S. CONST. AMENDS. V, XIV.

The State and Compelling Interests

The extent to which a state can regulate nonpublic schools has never been made clear by the United States Supreme Court. In *Pierce v. Society of Sisters*[34] the Court stated that "no question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils."[35] In *Wisconsin v. Yoder*[36] the Court determined that where a fundamental constitutional right such as free exercise of religion is at issue a state must prove the existence of a compelling interest before the state regulation can be enforced. The *Yoder* Court defined a government'a compelling interest in compulsory education to be a "degree of education . . . necessary to prepare citizens to participate effectively and intelligently in our open political system" and education which "prepares individuals to be self-reliant and self-sufficient participants in society."[37] The *Yoder* Court determined that Wisconsin's interest in literacy and marketable vocational skills for students could not override the Amish community's religious-based combination academic and vocational program. In *Runyon v. McCrary*[38] the Court addressed the application of section 1981 of the Civil Rights Act[39] to private, commercially operated nonsectarian schools. Without really discussing compelling interests the *Runyon* Court decided that the constitutionally protected rights of free association and privacy and a parent's right to direct the education of his children were subject to the exercise of federal legislative power fully consistent with *Pierce*. The rationale of the Court essentially was that the constitutional rights do not extend to the practice of excluding racial minorities from educational institutions.[40] The Court considered section 1981 to be a reasonable government regulation to overcome a social ill.

The absence of clear direction by the United States Supreme Court has been translated into a tendency for state courts to define compelling interests in a very expansive manner. In a leading recent case,

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34. 268 U.S. 510 (1925).
35. *Id.* at 534.
36. 406 U.S. 205 (1972).
37. *Id.* at 221.
38. 427 U.S. 160 (1976).
39. 42 U.S.C. § 1981. "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . ."
40. Interpretation of fundamental constitutional rights has been done according to a rights-action dichotomy since 1878 when the United States Supreme Court held that a constitutionally protected right to believe in polygamy as a religious belief did not extend to a protected right to practice such polygamy. United States v. Reynolds, 98 U.S. 145 (1879).

Nebraska v. Faith Baptist Church,[41] the Nebraska Supreme Court declared with reference to requiring teacher certification for nonpublic schools that "the State has a compelling interest in the quality and ability of those who are to teach its young people."[42] because "such a requirement is neither arbitrary nor unreasonable" and because "reasonable government regulations as to the quality of education furnished appear to be very minimal in nature."[43] When courts define compelling interests in their decisions regarding application of regulations to nonpublic schools only upon the facial reasonableness of statutes or the apparent reasonableness of legislative history[44] it is not clear that such courts are defining compelling interests in the same way as the *Yoder* Court. The *Yoder* Court appeared to view compelling interests from the perspective of the final produce or outcome of the educational process that left open optional methods to accomplish that product or outcome; examination of compelling interest solely on the basis of the facial reasonableness of the regulation at issue tends to focus solely upon the methods perceived as necessary to achieve a desired product or outcome with little flexibility for alternate methods.[45] It is certainly not clear that such inflexibility satisfies the United States Supreme Court's requirement that where a fundamental constitutional right is at stake that the government prove that its requirement is the least restrictive means to accomplish its governmental interests.[46]

Unfortunately, the absence of clear direction by the United States Supreme Court has done little to provide guidance for state courts as to what the parameters of a compelling interest ought to be and has produced a divergent array of definitions of state public policy deserving

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41. 301 N.W.2d 571 (Neb. 1980).
42. *Id.*
43. *Id.*
44. Dolter v. Wahlert High School, 483 F. Supp. 266 (N.D. Iowa 1980) (application of Title VII to nonpublic high school); Kelley v. The Day Care Center, Inc., 451 A.2d 1106 (Vt. 1982) (application of state labor relations act to nonpublic day care); State v. Andrews, 651 P.2d 473 (Hawaii 1982) (application of licensing requirements to day school); Damascus Commun. Church v. Clockamas Cty., 610 P.2d 273 (Or. Ct. App. 1980) (application of zoning ordinance to church school); Hough v. North Star Baptist Church, 312 N.W.2d 158 (Mich. Ct. App. 1981) (application of fire code to church school); Iowa v. Moorhead, 308 N.W.2d 60 (Iowa 1981) (application of teacher certification to church school). For a discussion of the unreasonable inflexibility of courts of applying regulations to nonpublic schools *see* R. Mawdsley & S. Permuth, *The Right of the State to Control Church-Related Schools*, SCHOOL LAW UPDATE—1982 48-59 (T. Jones & D. Semler, eds. 1983).
45. *E.g.*, courts have tended to refuse to allow comparative testing to substitute for meeting state licensure or certification requirements. *See* Nebraska v. Faith Baptist Church, 301 N.W.2d 571, 579 (1981).
46. *See* Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963).

of application to nonpublic schools. In *State ex rel. Nagle v. Olin*[47] a state compulsory attendance requirement that students attend a school with a certified teacher was unreasonable as applied to a non-Amish child in an Amish school, whereas in *Iowa v. Moorhead*[48] a requirement that attendance be at a school where there was a certificated teacher was held reasonsable. In *Vermont v. La Barge*[49] the state department of education had exceeded its legislative authority in requiring a Holiness Methodist school to be approved, whereas in *Nebraska v. Faith Baptist Church*,[50] state department of education approval prior to beginning a religious school was reasonable. In *Ohio v. Whisner*[51] curriculum requirements regulating not only the courses to be offered but also the amount of instructional time to be allocated to the subjects offered were held to be unreasonable, whereas in *North Dakota v. Shaver*[52] state department of education regulations specifying the courses to be offered were held to be reasonable. Finally, in *Kentucky State Board v. Rudasill*[53] a Kentucky constitutional provision providing that no man shall "be compelled to send his child to any school to which he may be conscientiously opposed" prohibited Kentucky from requiring that any teacher in a nonpublic school be certified or determining basic texts to be used in private or parochial schools.

Government and Fundamental Public Policy

While the above cases can be dissected and distinguished on the basis of differing sets of facts, they do indicate that various states are not in agreement as to how extensively nonpublic schools should be regulated. it is not clear whether state courts consistently view compelling interests as the same thing as prevailing and pervasive public policies and, if not, whether compelling interests are viewed as of lesser significance than public policy. The recent United States Supreme Court decision of *Bob Jones University v. United States*[54] was looked forward to as clarifying the regulatory relationship between government and nonpublic schools. Unfortunately, that decision has shed little light on the parameters of compelling interest which ought to be of concern to all nonprofit educational institutions.

47. 415 N.E.2d 279 (Ohio 1980).
48. 308 N.W.2d 60 (Iowa 1981).
49. 357 A.2d 121 (Vt. 1976).
50. 301 N.W.2d 571 (Neb. 1980).
51. 351 N.E.2d 750 (Ohio 1976).
52. 294 N.W.2d 883 (N.D. 1980).
53. 589 S.W.2d 877 (Ky. 1979).
54. 103 S. Ct. 2017 (1983).

In the *Bob Jones University*[55] case the Court decided that "the governmental issue at stake here [eradication of racial discrimination in education] is compelling."[56] Unfortunately, the Court's discussion is so brief between its initial declaration, "this Court has long held the Free Exercise of the First Amendment an absolute prohibition against governmental regulation of religious beliefs"[57] and its conclusion, "the governmental interest [eradication of racial discrimination] substantially outweights whatever burden denial of tax benefits places on petitioners exercise of their religious beliefs"[58] that state courts have virtually no guidance in defining compelling interests. A troublesome aspect of the Court's free exercise claims of Bob Jones University and Goldsboro is the Court's observation that "the interests asserted by petitioners cannot be accommodated with that compelling interest and no less restrictive means are available to achieve the governmental interest."[59] If the governmental interest is eradication of racial discrimination in education, then it is not clear how that interest will necessarily be accomplished simply by removing tax exemption. As the Court notes, removal of tax exemption "will not prevent those schools from observing their religious tenets."[60] Assuming that legislative authority were to exist, could IRS, or some other federal agency have secured an injunction against further operation of the two schools until the compelling governmental interest was satisfied, as some states have done against nonpublic schools?[61] Although loss of tax exemption

55. The *Bob Jones University* case was actually a joinder of two separate cases from the Fourth U.S. Court of Appeals involving Bob Jones University and Goldsboro Christian Schools. Bob Jones University is a four-year, co-educational, fundamentalist religious institution that also has a complete elementary and secondary school on its campus. Goldsboro Christian Schools operates complete elementary and secondary schools. Bob Jones University admitted blacks but barred interracial dating or marriage; Goldsboro refused to admit blacks. Both schools had appealed to the United States Supreme Court from adverse court of appeals decisions determining their tax exempt status had been removed and that they owed substantial back amounts under the Federal Insurance Contribution and Federal Unemployment Tax Acts. *See* Bob Jones University v. United States, 468 F. Supp. 890 (D.S.C. 1978), *rev'd*, 639 F.2d 147 (4th Cir. 1980) and Goldsboro Christian Schools v. United States, 436 F. Supp. 1314 (E.D.N.C. 1977), *aff'd*, No. 80-1473 (4th Cir. 1981) (per curiam).

56. 103 S. Ct. at 2035.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *See* Nebraska v. Faith Baptist Church, 301 N.W.2d 571 (Neb. 1981); Hough v. North Star Baptist church, 312 N.W.2d 158 (Mich. Ct. App. 1981); State v. Andrews, 651 P.2d 473 (Hawaii 1982). It might be questionable whether the federal government could intervene directly into education which is normally considered to be a state function. However, state responsibility for education did not prevent President Eisenhower from employing federal military forces to compel desegregation of Little Rock, Arkansas public schools. Exec. Order No. 10730, 3 CFR 389 (1954-1958).

would be a significant impediment to the effective operation of any nonpublic school, such a penalty would neither assure the compliance with governmental compelling interests nor the closure of noncomplying schools.[62]

The *Bob Jones University* decision has left unanswered several problem concerns that may be troublesome for nonpublic educational institutions in the future: (1) whether the determination of a fundamental public policy is largely a quantitative exercise; (2) whether any educational institution suspected of discriminating our found to have discriminated on racial grounds would now open itself up to IRS internal investigation; (3) whether acceptance of tax exemption now amounts to sufficient involvement with the state to constitute state action under section 1983 of the Civil Rights Act.[63] The Court determined that "racial discrimination in education is contrary to public policy" and that "racially discriminatory educational institutions cannot be viewed as conferring a public benefit within the 'charitable' concept ... underlying section 170 and section 501(c)(3)"[64] of the Internal Revenue Code. The Court cataloged a list of court decisions, executive orders and legislative actions (and non-actions)[65] to suggest that a fundamental public policy is a quantitative determination.[66] Unfortunately, the Court left no clues as to what quantum of action or nonaction is necessary to create a fundamental public policy. A fundamental public policy was variously defined as "established public policy"[67] involving "so important an issue"[68] that "the position of all three branches of ... Governmental was unmistakably clear."[69] In the broad area of what have been termed student rights, these rights have increasingly been codified in state statutes, state departments of education guidelines[70]

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62. E.g., Governor Robb in Virginia by executive order has denied tax-exempt status for private schools that racially discriminate in admissions, but that order has apparently not had any immediate impact on segregationist schools.

63. 42 U.S.C. section 1983. "Every person who, under color of any statute, ordinance, regulation ... to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured."

64. Bob Jones University at 2030-31.

65. *Id.* at 2033. The Court found persuasive the argument that Congress had failed over a period of 12 years to override the IRS policy and observed that "non-action by Congress is not often a useful guide, but the non-action here is significant." In his dissenting opinion Justice Rehnquist declared that "this Court continuously has been hesitant to find ratification through inaction." *Id.* at 2044.

66. *Id.* at 2029-30.

67. *Id.* at 2026.

68. *Id.* at 203..

69. *Id.* at 2032.

70. Examples of state statutes, state guidelines and interpretative court decisions in one state, Illinois, can be found in S. PERMUTH, THE PRINCIPAL, THE LAW AND STUDENT DISCIPLINE (1980).

and state and federal court decisions.[71] Similarly the rights of the handicapped originally grounded in the fourteenth amendment[72] have found expression in federal statutes and regulations[73] and have been protected in numerous cases.[74] Attempts to end sex discrimination have found expression in the Equal Pay Act[75] and Title IX[76] with numerous cases interpreting each act.[77] The *Bob Jones University* Court limited its determination of public policy to situations where there is "no doubt"[78] an organization's activities violate fundamental public policy, but there are no clear guidelines as to when a point is reached when all doubts have been removed.

Even if a fundamental public policy is found to exist it is not yet clear what the role of IRS ought to be in investigating the internal affairs of nonprofit educational institutions. Once it has been determined that a fundamental public policy exists, would IRS (or any other enforcement agency) be entitled to intrude as much as necessary into the internal affairs of a nonpublic institution to make certain that public policy is not thwarted? Could IRS order excising statements from a school catalog or reinstatement of dismissed students or faculty under penalty of loss of tax exemption? The Court's illustrations of educational organizations not serving a public, charitable purpose, "Fagin's school for educating English boys in the art of picking pockets" and a band of former military personnel training subversives and terrorists,[79] raise problems of application to most nonpublic schools. Is the Court declaring that it is the content of the educational institution's instruction which determines public benefit and, if so, is the Court further declaring that any nonpublic school would be ineligible for tax exemption as long as it *either* practiced *or* taught against a fundamental public policy? Could a nonpublic school lose its tax exempt status if IRS

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71. *See* R. PHAY, THE LAW OF PROCEDURE IN STUDENT SUSPENSIONS AND EXPULSIONS (NOLPE Monograph 1977). For a discussion of substantive student rights grounded in the fourteenth amendment *see* R. Mawdsley, *Constitutional Rights of Students*, THE COURTS AND EDUCATION (C. Hooker, ed. 1978).

72. Pennsylvania Ass'n for Retarded Children (PARC) v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971); Mills v. Board of Educ. of Dist. of Columbia, 348 F. Supp. 866 (D.D.C. 1972).

73. Rehabilitation Act of 1973, 29 U.S.C. § 794; 45 U.S.C.A. § 84.1; Education for All Handicapped Children Act of 1975, 20 U.S.C.A. § 1412.

74. Tatro v. State of Texas, 703 F.2d 823 (5th Cir. 1983); Grube v. Bethlehem Area School Dist., 550 F. Supp. 418 (E.D. Pa. 1982); Patsel v. District of Columbia Bd. of Educ., 530 F. Supp. 660 (D.D.C. 1982).

75. 29 U.S.C. § 206(d).

76. 45 C.F.R. § 86 (1975), 20 U.S.C. § 1681.

77. *E.g.*, Gunther v. County of Wash., 452 U.S. 161 (1981); North Haven Bd. of Educ. v. Bell, 102 S. Ct. 1912 (1982).

78. Bob Jones University at 2032.

79. *Id.* at 2039 n.18.

determined a school regulation requires all faculty believe in and teach matters that are interpreted as contrary to a fundamental public policy? It should be assumable that freedom of speech and academic freedom would protect school rules affecting faculty and student conduct and curricular decisions from IRS scrutiny but the Court's ambiguous definition of public policy leaves open the possibility that few areas of a school may be totally protectable.

Finally, the *Bob Jones University* decision raises concern whether tax exemption is sufficient to constitute state action under section 1983 of the Civil Rights Act or the fourteenth amendment.[80] Can the conferring of "a kind of monetary benefit"[81] through tax exemption, albeit sufficiently neutral for purposes of avoiding establishment of religion,[82] nonetheless be sufficient nexus for purposes of invoking those rights protected under section 1983 or the fourteenth amendment? To date, courts have consistently held that tax exemption is not sufficient nexus for purposes of applying constitutional rights on nonprofit educational institutions.[83] However, the majority in *Bob Jones University* observed that no educational institutions violating a fundamental public policy, *e.g.*, racial discrimination, "should be encouraged by having all taxpayers share in their support by way of special tax status."[84] The rationale in the past for not considering tax exemption to constitute state action has been that tax exemption does not "dictate or influence the administration of University affairs"[85] and that it does not insinuate the State "into a position of interdependence with the school . . . that it must be recognized as a joint participant in the challenged activity."[86] The *Bob Jones Univrsity* majority appears to have altered the traditional rationale because the continuance of tax exemption is considered to make the government a "joint participant" with the objectionable activity of the nonpublic school. If tax exemption is now an

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80. The concept of state action refers to a statutory and constitutional requirement that the statute and constitutional amendment do not apply to conduct unless a person has acted "under color of any statute, ordinance, regulation," (*supra* note 63) or unless a state makes a law abridging the privileges or immunities of a citizen (fourteenth amendment). When there are sufficient contacts between a private organization and a governmental unit, state action has been satisfied. *See* Jackson v. Statler Foundation, 496 F.2d 623 (6th Cir. 1974).

81. Bob Jones University v. United States, 639 F.2d 147, 152 (4th Cir. 1980). The United States Supreme Court recently held that tax exemptions constitute "subsidies" to tax-exempt organizations, Regan v. Taxation with Representation, ____ U.S. ____, 103 S. Ct. 1977 (1983).

82. Walz v. Tax Comm'n, 397 U.S. 664, 674-75 (1970).

83. *E.g.*, Huff v. Notre Dame High School, 456 F. Supp. 1145 (D. Conn. 1978).

84. Bob Jones University at 2030.

85. Huff at 1148.

86. Bright v. Isenbarger, 314 F. Supp. 1382, 1384 (N.D. Ind. 1970).

instrument to direct conformity of school matters with public policy, then it would seem that an interdependence possibly does exist between the government and a nonpublic school to constitute state action.

Summary

The entire area of state regulation of nonpublic schools is no more clear than when the United States Supreme Court handed down its monumental *Wisconsin v. Yoder* decision in 1972. That decision may well have been a high water mark restricting state incursions into nonpublic schools. The absence of definition for compelling interests and an enhanced role for IRS in enforcing fundamental public policy leaves administrators of nonpublic educational institutions uncertain whether their standards and practices, regardless how acceptable today, will not be penalized at some point in the future. It is clear now that tax exemptions are not a matter of constitutional right. But perhaps of greater concern is that tax exemption which has been a form of governmental encouragement of and acquiescence in educational diversity and pluralism may now become a powerful instrument to erode standards and practices unique to some nonpublic schools so that all nonpublic schools become gradually more secularized.

5

Federal Anti-Discrimination Legislation

Introduction

Federal anti-discrimination legislation can basically be divided into two categories: that which imposes requirements only if the private school receives federal assistance, and that which applies simply because the private school is an employer. The major anti-discrimination statutes in the former category are the Rehabilitation Act of 1973, as amended in 1974,[1] Titles VI[2] and IX[3] of the Civil Rights Act and the Age Discrimination Act of 1975.[4] The second category includes Title VII[5] of the Civil Rights Act, the Age Discrimination in Employment Act of 1967,[6] and the Equal Pay Act of 1963.[7]

Statutes Based on Federal Assistance

Rehabilitation Act of 1973 (as amended in 1974)

Federal handicapped legislation applies to private schools in two situations:

(1) Recipients of federal funds who use those funds for employment;[8]
(2) Private schools which have special programs approved for the handicapped and, under the Education for All Handicapped Children Act of 1975, parents with children in

1. 29 U.S.C. § 794. The Education for All Handicapped Children Act of 1975, 20 U.S.C. § 602 applies only to recipients of federal assistance operating a public elementary or secondary education program.
2. 42 U.S.C. § 2000d.
3. 20 U.S.C. § 1681-86.
4. 42 U.S.C. § 6101.
5. 42 U.S.C. § 2000e.
6. 29 U.S.C. § 621.34.
7. 29 U.S.C. § 206.
8. A § 504 claim is defective if it alleges only that an employer merely receives federal funds. A plaintiff must allege and prove that an employer received federal financial assistance, the primary objective of which was to provide employment. Miller v. Abilene Christian Univ. of Dallas, 517 F. Supp. 437 (N.D. Tex. 1981); United States v. Cabrini Medical Center, 639 F.2d 906 (2d Cir. 1981).

> such schools who are entitled to reimbursement from the state for expenses involved with the child's placement in the private program.

Section 504 of the Rehabilitation Act, as amended, provides that,

> no otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

Since its enactment a decade ago, section 504 has involved three critical interpretive questions:

(1) Who is a handicapped individual?
(2) When is a handicapped individual "qualified" to claim the protection of section 504?
(3) What is the nature of federal assistance necessary to invoke the protection of section 504?

The handicapped individual is very expansively defined and includes anyone with physiological disorders or conditions, cosmetic disfigurement, anatomical loss, or mental or psychological disorders.[9]

> Alcoholics and drug abusers who are reformed or rehabilitated are protected by the statute, but individuals whose current use of alcohol or drugs prevents them from performing their jobs or who are a direct threat to the safety of persons or property are not covered by the statute.[10]

Even though handicapped, a person is not an "otherwise qualified individual" unless he can perform the essential functions of the job in question "with reasonable accommodation."[11] In the leading case of *Southeastern Community College v. Davis*,[12] the United States Supreme Court upheld the denial of admission of a student with a serious hearing disability into a nursing program and ruled that otherwise qualified applicant is one who can meet the job's requirements in spite of his handicap. Schools are normally expected to make modifications in their academic programs to accommodate handicapped individuals except where the academic requirements "are essential to the program of instruction being pursued . . . or to any directly related licensing requirement. . . ."[13] Two students, each with

9. 45 C.F.R. § 84.1(j).
10. LEGAL DESKBOOK FOR ADMINISTRATORS OF INDEPENDENT COLLEGES AND UNIVERSITIES IV-53 (K. Weeks, ed. 1981).
11. 45 C.F.R. § 84.12.
12. 442 U.S. 397 (1979).
13. 45 C.F.R. § 84.44

vision in only one eye, who were denied participation in contact sports based upon medical testimony were not "otherwise qualified."[14] In a leading private school case, *Barnes v. Converse College*,[15] the college which admitted a hearing impaired teacher into its summer program was required to furnish an interpreter at the school's expense. However, in another case, a school did not have to provide a deaf interpreter where the student through other personalized instruction was advancing easily with her class.[16] Schools are not prohibited from operating separate, comparable classes for the handicapped but cannot require the handicapped to attend those classes unless education in a traditional setting cannot be accomplished satisfactorily.[17] Private elementary and secondary schools are prohibited from charging more for providing an appropriate education to the handicapped "except to the extent that any additional charge is justified by a substantial increase in cost to the recipient."[18] Just what kinds of services would amount to a "substantial increase in cost" has not been determined but it would seem to be education that cannot be accomplished in "the regular environment with the use of supplementary aids and services."[19]

The turmoil in the public sector involving the use of minimum competency testing and awarding of diplomas does not appear to have generally impacted private schools yet,[20] presumably because many private schools exclude certain handicapped students in the admissions process and declare contractually through brochures and handbooks what the academic requirements are for the schools. However, private schools that receive federal assistance and come within the federal handicapped regulations would want to follow closely the controversy in the public sector.[21] Private schools that have special programs for handicapped and receive placements from the public sector need to be aware of a growing body of laws regarding when and how much public reimbursement for private school placement is permitted. Without reimbursement most parents could probably not afford private school

14. Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977).
15. 436 F. Supp. 635 (D.S.C. 1977).
16. Board of Educ. v. Rowley, 102 S. Ct. 3034 (1982).
17. 45 C.F.R. § 84.4, 84.34.
18. 45 C.F.R. § 84.39(b).
19. 45 C.F.R. § 84.34(a).
20. *Cf.* Debra P. v. Turlington, 644 F.2d 397 (5th Cir. 1981) with Brookhart v. Illinois State Bd. of Educ., 534 F. Supp. 725 (C.D. Ill. 1982) *rev'd* on the issue of adequacy of notice, 697 F.2d 179 (7th Cir. 1983).
21. If the United States Supreme Court decides in Bob Jones University v. United States, 639 F.2d 147 (4th Cir. 1980), *cert. granted*, 102 S. Ct. 386 (1981) that public policy against segregation can override a religious defense then public policy favoring equal opportunities for handicapped could possibly also override contractual limitations.

education. The guarantee of "free appropriate public education" in the Education for All Handicapped Children Act[22] does not require an education synonymous with the best possible education in a private school, nor is it education which enables the child to achieve full potential because even the best public schools lack resources to enable every child to achieve his full potential.[23] Tuition reimbursement has been denied to parents where parents have removed the child from the public school before restoring to due process hearing procedures[24] or while the administrative procedures are still pending.[25]

In employment situations a covered private school must seek to make "reasonable accommodations" to the handicap unless such accommodations would constitute an "undue hardship."[26] In *Cain v. Archdiocese of Kansas City*[27] a teacher had a private cause of action under section 504, providing she could prove that federal funds received by the school were used for employment purposes. She had been hired to teach in a Catholic elementary school and then terminated prior to the beginning of the school year because of a medical problem which the teacher said was only mild epilepsy easily controlled by dilantin.

The third interpretive question regarding the nature of federal assistance to invoke coverage under section 504 has already been mentioned. Section 504 applies only to situations where an employer receives funds administered by the Department of Education[28] and used for employment purposes. Unless this third requirement is met there is no cause of action under section 504.

Title VI

Title VI provides that,

> no person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[30]

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22. 20 U.S.C. § 612(i), 1412(1).
23. Bales v. Clarke, 523 F. Supp. 1366 (E.D. Va. 1981). *See also* Buckholtz v. Iowa Dep't of Pub. Servs., 315 N.W.2d 789 (Iowa 1982).
24. Foster v. District of Columbia Bd. of Educ., 523 F. Supp. 1142 (D.D.C. 1981).
25. Newport-Mesa Unified School Dist. v. Hubert, 183 Cal. Rptr. 334 (Cal. Ct. App. 1982); Grymes v. Madden, 672 F.2d 321 (3d Cir. 1982). *Contra* Blomstrom v. Massachusetts Dep't of Educ., 532 F. Supp. 707 (D. Mass. 1982).
26. 45 C.F.R. § 84.12(a).
27. 508 F. Supp. 1021 (D. Kan. 1981).
28. 45 C.F.R. § 84.2 (formerly HEW).
29. *See supra* note 8.
30. 42 U.S.C. § 2000d.

Title VI has no exemption for religious practices. "Federal financial assistance" under the act has been applied to any federal assistance regardless of origin, including V.A. benefits.[31] Title VI has been held to provide for a private cause of action[32] with the usual governmental remedy for violation being withdrawal of funds.[33] The most significant recent use of Title VI has not been as an enforcement instrument but as a precedent in Title IX cases that federal assistance under Title IX should not be program specific.[34]

Title IX

Title IX provides that,

> no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal assistance.

Sex discrimination has experienced considerable turmoil involving what is a "program or activity." The federal courts are split on the question as to whether Title IX is invoked when federal assistance is received by any part of the school[35] or only when it is received by the specific program in which the alleged sex discrimination occurred.[36] The United States Supreme Court in *North Haven Board of Education v. Bell*[37] recently applied Title IX to employment practices on a program specific basis but did not define precisely what a program was. In a much publicized case a terminated pregnant unmarried private college teacher was awarded $45,000 in an out-of-court settlement of a Title IX complaint when she alleged (and apparently could have proved) that male faculty adulterous affairs did not result in termination.[38]

Title IX generally prohibits any discrimination in selection in benefits for employees or admission and accommodation of students[39]

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31. Bob Jones Univ. v. Johnson, 396 F. Supp. 597 (D.S.C. 1974).
32. University of Calif. v. Bakke, 438 U.S. 265 (1978).
33. *See* Bob Jones Univ. v. Johnson, *supra* note 31.
34. Grove City College v. Bell, 687 F.2d 684, 691 (3d Cir. 1982).
35. Grove City College v. Harris, 500 F. Supp. 253 (W.D. Pa. 1980), *aff'd*, 687 F.2d 684 (3d Cir. 1982); Haffer v. Temple Univ., 524 F. Supp. 531 (E.D. Pa. 1981), *aff'd*, 688 F.2d 14 (1982).
36. Othen v. Ann Arbor School Bd., 507 F. Supp. 1376 (E.D. Mich. 1981); University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982); Bennett v. West Texas State Univ., 525 F. Supp. 77 (N.D. Tex. 1981); Rice v. President of Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981); Hillsdale College v. HEW, 696 F.2d 418 (6th Cir. 1982).
37. 50 U.S.L.W. 4502 (U.S. 1982).
38. Landphair v. Lynchburg College, No. 79-0003-L (D. Del. 1980).
39. 45 C.F.R. § 83.11.

but does permit certain kinds of discrimination such as separate but comparable toilet, locker room and shower facilities,[40] separation by sex within physical education classes involving bodily contact sports,[41] continued existence of educational institutions admitting only one sex[42] and exemption for "an educational institution which is controlled by a religious organization if the applications of this subsection would not be consistent with the religious tenets of such organization."[43] However, the religious exemption must be claimed in written request to the director of the Office for Civil Rights of the department of education identifying which parts of the regulations conflict "with a specific tenet of the religious organization."[44] The department of education has recently revoked its rules under Title IX barring discriminatory school dress codes because the rules were generally not upheld in court.[45]

Title IX parallels Title VI in two respects. Title IX permits a private cause of action[46] and requires a burden of proof of intentional discrimination rather than disparate impact.[47]

In view of the uncertainty as to whether Title IX is "program-specific" private schools receiving federal assistance administered by the department of education should examine employment practices such as hiring, classification, promotion, termination and fringe benefits to eliminate any discrimination on the basis of sex unless sex is a bona fide occupational qualification.[48] Schools need to also be aware of state statutes which may be contrary to Title IX[49] or which may accord rights to an injured plaintiff beyond Title IX.[50]

Age Discrimination Act of 1975

The Age Discrimination Act of 1975 prohibits "unreasonable discrimination on the basis of age in programs or activities receiving Federal financial assistance."[51] Specifically excluded from coverage is

40. *Id.* at § 86.33.
41. *Id.* at § 86.34.
42. *Id.* at § 86.16.
43. *Id.* at § 86.12(a).
44. *Id.* at § 86.12(b). Reliance upon a specific religious tenet parallels the argument by some courts in sustaining state regulations of religious schools and home instruction. State v. Faith Baptist Church, 301 N.W.2d 571 (Neb. 1981); State v. Riddle, 285 S.E.2d 359 (W. Va. 1981).
45. 16 NOLPE NOTES 4 (Sept. 1981).
46. Cannon v. University of Chicago and Northwestern Univ., 441 U.S. 677 (1979).
47. Cannon v. University of Chicago and Northwestern Univ., No. 80-1763 (7th Cir. 1981).
48. *See* suggestions at K. Weeks, ed., *supra* note 10 at IV-38, 39.
49. Striebel v. Minnesota State High School League, 321 N.W.2d 400 (Minn. 1982).
50. Thompson v. Board of Educ. of Romeo Commun. Schools, 526 F. Supp. 1035 (D.C. Mich. 1981).
51. 42 U.S.C. § 6102.

"differentiation . . . based upon reasonable factors other than age."[52] This act applies only to persons between the ages of 40 and 70 and the standard of proof is probably discriminatory purpose, as opposed to the easier discriminating effect.[53]

This act is seldom litigated since most age discrimination cases are brought under the 1967 act. However, interesting questions have been raised involving re-entry of women into academic institutions, especially in higher education, after a lapse of years to raise children.[54] Most of the re-entry problems faced by women would not be cognizable under the 1975 act because the rules may have a discriminatory effect but were never intended to discriminate. Some of the problems are:

(1) Letters of recommendation required from schools not attended for years;
(2) Changes in pre-requisite courses;
(3) Grade inflation;
(4) Age limitation on transfer credits;
(5) G.R.E. scores considered valid for only a certain number of years;
(6) Limitations on financial aid due to husband's income;
(7) Part-time student problems such as financial aid limited to full-time students, class schedules, faculty advisors not available and absence of child care.[55]

In today's competitive market for a decreasing number of students, private colleges may do well to alter rules that discourage re-entry students and private elementary and secondary schools may want to consider auxiliary support child-care services that would assist re-entry.

Statutes Not Based on Federal Assistance

Title VII (Civil Rights Act)

Title VII, unquestionably the workhorse of federal anti-discrimination legislation, prohibits employment practices that

52. 42 U.S.C. § 6103(b)(1)(B).

53. *Cf.* Standard of proof for discriminatory purpose in an age discrimination in employment act case where the plaintiffs met their burden by showing that they were within the protected group, they were discharged against their will, they apparently had done satisfactory work and their work had been taken over by younger employees. Marshall v. Roberts Dairy Co., 572 F.2d 1271 (1978).

54. Some excellent materials on this subject are available from Project on the Status and Education of Women, Association of American Colleges, 1818 R. St. N.W., Washington, D.C. 20009. The basic publication is entitled "Barriers to Re-Entry Women: College Transfer Policies, Residency and Graduation Requirements."

55. In an interesting case, a decision by a college not to fund a child care service for women attending classes was held to support a Title IX cause of action. De La Cruz v. Torney, 582 F.2d 45 (9th Cir. 1978).

discriminate in hiring, discharge or classification based on race, color, religion, sex or national origin.[56] Title VII requires an employment relationship. An insurance company which handles the annuity program for a school is not bound by Title VII but a school is liable if it chooses an insurance company that discriminates under Title VII.[57] A financial aid agreement between a varsity football player and a public university has been held to establish an employer-employee relationship for Workman's Compensation[58] but whether such a relationship would be sufficient for a Title VII action is not certain.

Title VII has a number of important exemptions that will affect some private schools:

(1) The act does not apply to employers with fewer than 15 employees.[59]
(2) The act exempts hiring, discharge or classification based on religion, sex or national origin where "religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the operation of that particular business or enterprise."[60]
(3) The act also exempts employment of persons of a particular religion if the institution is "in whole or in substantial part, owned, supported, controlled, or managed by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion."[61]

Title VII has become the most popular vehicle for prosecuting discrimination complaints for several reasons. First, Title VII requires only proof of disproportionate impact whereas Section 1983, Title VI and Title IX require proof of discriminatory motive.[62] A prima facie case is established by alleging that plaintiff:

(1) is a member of a Title VII protected class;
(2) has made application for an available position for which he is qualified;

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56. 42 U.S.C. § 2000e-2(a).
57. Peters v. Wayne State Univ., 691 F.2d 235 (6th Cir. 1982).
58. Rensing v. Indiana State Univ. Bd. of Trustees, 437 N.E.2d 78 (Ind. Ct. App. 1982).
59. 42 U.S.C. § 2000e(b).
60. 42 U.S.C. § 2000e-2(e)(1).
61. 42 U.S.C. § 2000e-2(e)(1).
62. *See Covert Sex Discrimination: Evidentiary Burdens under Title VII and Section 1983 Compared*, 53 S. CAL. L. REV. 1747 (1980).

(3) was rejected under circumstances which give rise to an influence of unlawful discrimination.[63]

However, once defendant employer proffers evidence that the person actually employed was better qualified the inference is overcome and plaintiff must prove discriminatory intent.[64] A second advantage is that Title VII permits use of statistics to prove an impact based on relationship to the population at large,[65] a pool of applicants[66] or a relevant geographical area.[67] Finally, Title VII offers a broad range of remedies: back pay up to 2 years, injunctive relief and attorney's fees.[68]

A number of recent cases involving nonpublic schools indicates the application of Title VII to such schools. In *Dolter v. Wahlert High School*[69] an unmarried Catholic high school teacher who had become pregnant during the school year and had her contract terminated for the subsequent school year had a triable Title VII cause of action. The court held that, despite the Catholic Church's moral principles regarding pre-marital sex, she should be permitted to attempt to prove discrimination if men engaging in pre-marital sex would not also be discharged. In *Riter v. Mount St. Mary's College*[70] a Catholic lay female teacher in a Catholic school had a Title VII cause of action when denied tenure because the denial of tenure had nothing to do with the religious exemption. In *E.E.O.C. v. Mississippi College*[71] a white Presbyterian female part-time teacher not hired for a full-time teaching position, subsequently filled by a white Baptist male, was entitled to an evidentiary hearing to raise the issues of sex discrimination for herself and race discrimination for non-hiring of blacks. The school would have to prove by convincing evidence that its hiring was pursuant to its religious practice of giving preference to Baptists. However, once the school presented such proof E.E.O.C. could not inquire further to determine whether the religious discrimination was a pretext for some other kind of discrimination. In *E.E.O.C. v. Southwestern Baptist Theological Seminary*[72] EEOC was held to have no jurisdiction

63. Texas Dep't of Commun. Affairs v. Burdine, 450 U.S. 248, 253 (1981).
64. Lewis v. Central Piedment Commun. College, 689 F.2d 1207 (4th Cir. 1982).
65. Dothard v. Rawlinson, 433 U.S. 321 (1977).
66. Blake v. City of Los Angeles, 595 F.2d 1367 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1865 (1980).
67. Hazelwood School Dist. v. United States, 433 U.S. 299 (1977); Kaplan v. International Alliance of Theatrical and Stage Employees, 525 F.2d 1354 (9th Cir. 1975); Schaeffer v. Tannian, 394 F. Supp. 1136 (E.D. Mich. 1975).
68. 42 U.S.C. § 2000e-5(g). *See* Wangsness v. Watertown School Dist., 541 F. Supp. 332 (D.S. Dak. 1982) where all three remedies are discussed.
69. 483 F. Supp. 266 (N.D. Iowa 1980).
70. 495 F. Supp. 724 (D. Md. 1980).
71. 626 F.2d 477 (5th Cir. 1980).
72. 485 F. Supp. 255 (N.D. Tex. 1980).

over the seminary's faculty because applying Title VII "to any aspect of the employment relationship between the Seminary and its faculty and administrators, by virtue of their status as ministers, infringes upon the free exercise clause of the first amendment."[73] Even the seminary's support personnel were exempt from E.E.O.C. scrutiny because the seminary had imposed "religious responsibilities on their role that go beyond objective employment duties and skills and beyond simple church membership."[74] However, the court observed that "a school of divinity operated as an adjunct to a larger secular institution, sharing its physical space and utilizing its administrative services and personnel, would be hard pressed to convince this court that the orthodoxy of its non-teaching staff was necessary to discipline its students in the daily practice of a religious life."[75]

The lessons for religious affiliated schools on the basis of cases cited above are significant. Title VII does not provide an exemption for religious schools, as such, but only for areas involving a specific religious tenet. Thus segregation by sex would be permissible in elementary, secondary or post-secondary physical education programs where religious tenets of modesty or sexual propriety are at stake. Likewise some religious schools may employ only men to teach religious courses where their religious tenets prohibit instruction of males by females. The exclusion of any religious school personnel from Title VII coverage transcends the matter of doctrinal purity. For example, a religious school requiring adherence to a set doctrinal statement for all employees can refuse to hire a female or minority applicant for an administrative position who refuses to ascribe to that statement. However, if the female or minority applicant ascribes to the statement the school must then consider all applicants solely on the basis of qualifications for the position. The religious school would be exempt from Title VII for not hiring a superior qualified female or person of another religion only if the school had a specific religious tenet prohibiting women or such person of another religion from holding an administrative position. The long awaited decision of the United States Supreme Court in *Bob Jones University v. United States*[76] unfortunately has provided little definition for the application of religious tenets. The Court's determination that religious tenets must be accommodated to well defined public policy will still make religious sex discrimination the subject of future litigation.[77]

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73. *Id.* at 260.
74. *Id.*
75. *Id.* at 260-61.
76. 103 S. Ct. 2017 (1983).
77. For a thorough discussion of the policy implications of the *Bob Jones* case, *see* R. Mawdsley & S. Permuth, *Bob Jones University v. United States: Public Policy and Religious Institutions*, 1 WEST'S EDUC. LAW REP. 745 (1981).

Title VII permits discrimination in an employment practice on the basis of religion, sex or national origin (but *not* race or color) where such discrimination can be shown to be "a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operations" of the institution.[78] The E.E.O.C. which is responsible for enforcing Title VII, has indicated that it will interpret narrowly BFOQ. Private school officials need to examine carefully qualifications for teaching and other school-related positions to determine that the qualifications are necessarily related to the job description. Qualifications could extend to a wide range of topics, such as educational background, practical training, and physical and mental health but minimum test scores are subject to challenge if the test has a cultural bias or is unrelated to the functions of the job.[79] Any physical or mental qualifications, of course, need to be considered in light of the Handicap Act's requirement for "reasonable accommodation."[80] Qualifications which relate to marital status or anti-nepotism policies are definitely suspect.[81] Courts will scrutinize carefully any non-race job requirements to determine if there is any rational basis for the requirement.[82] In addition, informal recruiting procedures by word of mouth may be suspect if the effect is a disparately negative impact on a classification protected by Title VII.

The care in hiring for new positions needs to be applied also to internal promotions. The same requirements of notice and job-related requirements would apply as much to internal advancement as to external hiring. Private schools need to beware of discriminating in promotions against employees who actively oppose institutional practices prohibited by Title VII. Such discrimination, *e.g.*, labeling as "troublemaker" or writing unfavorable letters of recommendation, would constitute a separate Title VII offense.[83] School officials need to be aware also that discriminatory short-cuts and subterfuges can usually be exposed through a comprehensive discovery process. School officials need to expect plaintiff's attorney during discovery to ask such questions as: "Has the educational requirement for any job ever been waived?" "Has the state regulated license requirement for any job ever

78. 42 U.S.C. § 2000e-2(e).
79. Griggs v. Duke Power Co., 401 U.S. 424 (1971).
80. *See, supra* note 11.
81. *See*, Weeks, *supra* note 10 at IV-39.
82. *See* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979); Dothard v. Rawlinson, 433 U.S. 321 (1977); Boyd v. Ozark Airlines, 419 F. Supp. 1061 (1976) *aff'd*, 568 F.2d 50 (8th Cir. 1977). *See also*, L. Kanowitz, *Benign Sex Discrimination: Its Troubles and Their Cure*, 31 HASTINGS L.J. 1379 (1980).
83. *See*, Weeks, *supra* note 10 at IV-28-30 for excellent prophylactic suggestions.

been waived?" "Has the work experience requirement for any job ever been waived?" "Has the requirement of mastery of an occupational skill for any job ever been waived?"[84]

Age Discrimination in Employment Act of 1967

The Age Discrimination in Employment Act (ADEA) prohibits hiring, discharge, classification or wage rate of employees based on age.[85] An aggrieved party states a *prima facie* case under the act by alleging:

(a) an employment decision unfavorable to him;
(b) an age within the 40-70 age range to which the act applies;
(c) the real reason for employer's decision was complainant's age.

Age Discrimination in Employment Act provides four affirmative defenses. A complainant can be treated unequally if "the differentiation is based on reasonable factors other than age."[86] Also, it is a denial of complainant's claim that the employee was discharged for "good cause."[87] The last two affirmative defenses are use of age as "a bona fide occupational qualification reasonably necessary to the normal operation of the particular business"[88] and acting according to the terms of a bona fide seniority system or bona fide employee benefit plan.[89]

Any school rule which affects employees on the basis of age can be justified as long as there is a rational basis for the rule.[90] Thus a regulation requiring termintion of school bus drivers upon attaining age 65 was an acceptable bona fide occupational qualification because "safe transportation of infants to school and school-related activities is a paramount concern."[91] However, in *Markham v. Galler*[92] a public school district policy of hiring less experienced teachers to save money violates ADEA even if the school district did not intend to discriminate on the basis of age. Since the amount of money a school has to spend for a new teacher is presumably a BFOQ, a private school could refuse to hire a teacher if the teacher's years in experience placed the teacher beyond the amount of money available for hiring based upon the school's salary scale. But to determine in advance that the applicant

84. D. DANNER, PATTERN DISCOVERY: EMPLOYMENT DISCRIMINATION 33-45 (1981).
85. 29 U.S.C. § 623.
86. *Id.* at 623(f)(1).
87. *Id.* at § 623(f)(3).
88. *Id.* at § 623(f)(1).
89. *Id.* at § 623(f)(2).
90. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); Sposato v. Ambach, 453 N.Y.S.2d 149 (N.Y. Sup. Ct. 1982).
91. Sposato at 151.
92. 635 F.2d 1027 (2d Cir. 1980) (*cert. denied* 1981).

with the least number of years experience will be the one hired violates ADEA. Whether a private school could decide to hire only applicants with baccalaureate degrees and no graduate degrees is not as clear. Whereas years of experience necessarily stand by themselves as chronologically related to age, the earning of graduate degrees do not stand as nearly separate. Since most teachers and administrators earn graduate degrees while teaching or administering, the age of an applicant is really a factor of the years of teaching rather than non-teaching years for separate graduate study.

Age Discrimination in Employment Act applies not only to external hiring but also to internal promotions. In *Marshall v. Board of Education*[93] failure to consider a person, otherwise qualified for a position, because he was 2 years from mandatory retirement violated A.D.E.A. There are a number of "good cause" reasons why an older employee might not be promoted which would rebut an A.D.E.A. charge, such as written evaluations documenting poor performance, refusal to cooperate with a new supervisory person or antagonism of other employees.[94]

Normally, employee benefits cannot be terminated or reduced on account of an employee's age. However, since certain benefits, such as life and disability insurance premiums, are related to age, it is permissible to alter benefits for older faculty and staff members if the alterations are justified by cost considerations. The E.E.O.C. Interpretative Bulletin makes the following explanation:

> Benefit levels for older workers may be reduced to the extent necessary to achieve approximate equaivalency in cost for older and younger workers. A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of benefits or insurance coverage.[95]

Equal Pay Act of 1963

The Equal Pay Act, an amendment to the Fair Labor Standards Act provision on minimum wage,[96] prohibits employers from discriminating on the basis of sex in paying wages among employees

93. 15 Fair Employment Prac. Cas. (BNA) 368 (D. Utah 1977).
94. *See*, Weeks, *supra* note 10 at IV-49.
95. 29 C.F.R. § 860.
96. 29 U.S.C. § 206(d).

> by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. . . .[97]

The Equal Pay Act exempts differential wage payments made pursuant to "(1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any other factor other than sex."[98]

The problem of equal pay for equal work has generated two kinds of legal problems. The first problem has involved statutory interpretation of "equal skills, effort, and responsibility (and) similar working conditions." A second problem with broader implications is whether the Equal Pay Act provides the only standard for determining equal pay or whether Title VII of the Civil Rights Act can be used as more comprehensive vehicle to advance allegations of unequal pay. Women's rights advocates have turned to Title VII as a means of advancing their claims of comparable worth which are foreclosed under the Equal Pay Act.

Regarding the first problem, a number of representative cases will illustrate how the courts are interpreting the Equal Pay Act. It is well for private school officials to be aware that in interpreting the Act, courts will "look to the actual job requirements and performance, not on-job classification or titles."[99] In other words courts will look at what employees actually do and not at what job descriptions say they are supposed to do. In *Orahood v. Board of Trustees of the University of Arkansas*[100] the female complainant serving as acting director of the Office of Institutional Studies could be paid significally less than a male Assistant Controller in the controller's office because "the jobs were not substantially equivalent."[101] The controller's office was larger than the Office of Institutional Studies with more employees to supervise. The controller position required knowledge and work in financial and accounting matters while the position occupied by complainant dealt with statistics and supplying materials to the university and governmental agencies as requested. In addition, the assistant controller had been given the authority to hire or fire while complainant had only input into these decisions.

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97. *Id.* at § 206(d)(1).
98. *Id.*
99. Orahood v. Board of Trustees of Univ. of Ark., 645 F.2d 651, 654 (8th Cir. 1981).
100. *Id.*
101. *Id.* at 655.

In a leading private school case, *Horner v. Mary Institute*,[102] a federal appeals court upheld school's hiring of a male physical education teacher at a higher starting salary and with significantly greater annual salary increases than a female physical education teacher. The court observed that the male teacher "was to develop and implement a physical education curriculum for children in grades K through 4" whereas the female complainant only had "to teach courses selected by someone else."[103] In addition the court noted that the male teacher had a higher level of accountability because he "reported directly to his school head and to parents on his physical education programs."[104] In *Horner* the initial higher salary offer to the male teacher was to equal his expected salary increase at his former school because of the extremely favorable supervisory ratings in teaching at that school and in response to his excellent development of curriculum. Because private institutions frequently find themselves in situations where they must provide added financial incentives to attract the most capable person, the *Horner* court observed that

> it is our view that an employer may consider the market place value of the skills of a particular individual when determining his or her salary.

In *Jacobs v. College of William and Mary*[105] a male head basketball coach of the men's team was found to have sufficiently different duties to warrant higher pay as compared to the female women's basketball coach. The court observed that male coach's responsibilities in Division I basketball required extended travel and absence from home, along with writing and telephoning, while plaintiff's required duties as a coach in the AIAW were telephoning writing or responding to letters. The male coach's employment extended to 12 months a year while plaintiff's duties were for 9 months and were generally limited to 3 days a week. Plaintiff attempted to compare herself to the higher paid baseball coach but the court dismissed that comparison by observing that "he teaches full time, while plaintiff does not."[106]

Generally, the Equal Pay Act has not been a significant vehicle against educational institutions,[107] but the possibility of using Title VII

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102. 613 F.2d 706 (8th Cir. 1980). Both teachers were hired for the 1974-75 school year with the male receiving $9,000 and the female $7,500. The salary increases for the male teacher for the years 1975-79 exceeded his female counterpart from $200-$800 each year.
103. 613 F.2d at 714.
104. *Id.*
105. 517 F. Supp. 791 (E.D. Va. 1980).
106. *Id.* at 797.
107. *See also*, Marshall v. Dallas Indep. School Dist., 605 F.2d 191 (5th Cir. 1979); EEOC v. Kenosha Unified School Dist. No. 1, 620 F.2d 1220 (7th Cir. 1980).

to argue comparable worth claims is more ominous. Apparently in an attempt to foreclose the use of Title VII as an instrument to advance comparable worth claims, Congress amended Title VII in 1976 to authorize an employer to:

> Differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees.... If such differentiation is authorized by provisions of (the Equal Pay Act).[108]

The second major problem addressed at the beginning of this article regarding whether the Equal Pay Act is the only vehicle for a consideration of differential pay disputes was ruled on by the United States Supreme Court recently in *Gunther v. County of Washington.*[109] In *Gunther* the court agreed taht there was no Equal Pay Act violation when Oregon male prison guards were paid more than female prison guards because "the male guards supervised more than 10 times as many prisoners per guard as did the female guards and the females devoted much of their time to less valuable clerical duties."[110] However, the court held the Equal Pay Act did not prevent plaintiff's attempt to prove under Title VII that

> their wages were depressed because of intentional sex discrimination, consisting of setting the wage scale for female guards, but not for male guards, at a level lower than its own survey of outside markets and the worth of the jobs warranted.[111]

The court was careful to observe that plaintiff's claim was not

> based on the controversial concept of 'comparable worth' under which plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community.[112]

Despite the court's disclaimer that its decision is not an endorsement of comparable worth claims, there is little doubt that plaintiffs

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108. 42 U.S.C. § 2000e-2(b) (referred to as the Bennett Amendment).

109. 452 U.S. 161 (1981).

110. *Id.* at 165.

111. *Id.* at 166. The county had conducted an evaluation of the female and male jobs and based on the worth of the jobs from that survey the county should have paid the female guards 95% as much as it paid the male guards. However, the county chose to ignore its survey and paid the female guards only 70% of what it paid the male guards.

112. *Id.* There are really three different approaches to a comparable worth complaint. For an excellent summary of these three approaches, *see* J. LEWIS, *Comparable Worth: Is It Anything More Than 'The Latest' Discrimination Issue?*, SCHOOL LAW IN CHANGING TIMES (NOLPE/McGhehey, ed. 1982).

prohibited from redress under the Equal Pay Act, because they cannot prove equal work, can now press their claims under Title VII to prove comparisons of unequal work. What the *Gunther* court does not provide guidance on is whether a sex-based discrimination claim under Title VII requires proof of intentional discrimination in disparate impact situations as well as disparate treatment. Title VII disparate treatment cases require proof of intentional discrimination, whereas disparate impact does not.[113] Can private school employees now prove sex-based discrimination merely by showing that an employer's wage setting practices result in disproportionately more women receiving lower wages than men; or that predominantly male jobs are paid more than predominantly female jobs? The *Gunther* decision does not provide clear guidance but in a recent federal district court decision involving higher education, a court declared that:

> when the issue of salary differentials can be brought under both statutes (Title VII and Equal Pay), the legal standards established under the Equal Pay Act controls. . . . Title VII . . . refers specifically to the Equal Pay Act and states that a sex-predicated wage differential is immune from attack under Title VII only if it comes within one of the four enumerated exceptions to the Equal Pay Act. . . . It simply cannot be asserted that Title VII's standard supplants or undermines the standards established under the Equal Pay Act.[114]

If the rationale of the above district court prevails it is obvious that the effect of the *Gunther* decision has been stunted.

It should be apparent to private school officials that the uncertainty regarding the inter-play between the Equal Pay Act and Title VII necessitates a careful review of wage structures with careful attention to explaining differences between wages paid in jobs occupied predominantly by females and those occupied predominantly by males. Jobs such as office clerks, food service workers, librarians, nurses and teachers aids are, in the typical private school, held predominantly by females. The day may come in the not-too-distant future when these jobs may be worth more than they are paid. Private school personnel responsible for setting wages must be prepared to explain the business reasons for wage differentials.

113. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1970).
114. Melanson v. Rantoul, 536 F. Supp. 271, 286 (D.R.I. 1982).

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Copyright Law: Practices and Limitations

Rationale for a New Law

Copyright is a form of protection provided to authors of literary, dramatic, musical, artistic and certain other intellectual works,[1] whether or not the works are published or unpublished.[2] In our country the authority for copyright laws is found in the Constitution where it is provided in article I section 8 that

> The Congress shall have power . . . to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their writing and discoveries.

Prior to the effective date of the new 1976 Copyright Law on January 1, 1978, the United States had operated for almost seven decades under the Copyright Law of 1909. The Act of 1909 was severely limited by problems such as the assumption that the printing press would be the prime disseminator of information and the absence of specific reference to the institutional care of materials. The Act of 1909 needed to be revised primarily because of the totally unanticipated and rapid use of technologically advanced communication techniques: radio, television, computers, videotapes, and the most important of all school duplication processes, the electrostatic copying system.[3]

There is little question that the rapid improvement in photocopy techniques, as well as the extensive use of photocopied material by educators and the frequent distribution of multiple photocopies to

1. 17 U.S.C. § 102(a).
2. Publication is no longer the key to statutory copyright under the 1976 Act as it was under the Act of 1909. Publication without notice of copyright no longer automatically invalidates a copyright; under the 1976 Act omission of copyright notice generally can be corrected within 5 years. 17 U.S.C. §§ 405, 406.
3. *See*, S. Permuth & R. Mawdsley, *The Copyright Law: Implications for the Principal*, NASSP LEGAL MEMORANDUM (Sept. 1981).

students was a motivating factor for the new law.[4] The 1909 copyright law gave a broad exemption from the law to use of materials for educational purposes. In balancing the equities between the economic expectations of the copyright owner and the public's interest in access to and disseminatin of copyrighted material, interpretations of fair use under the 1909 copyright law tended to make "reward to the owner a secondary consideration."[5] The rapid change in technology and communication techniques available to educators in the last 25 years was perceived by copyright owners as unreasonably impairing their economic return.

Fair Use

Despite the fact that Congress could have seized upon the opportunity in the 1976 Copyright Law to clearly resolve conflicting social policies regarding expectation of economic return versus right of educational access to copyrighted materials, there is little question that the new copyright law is "a warped and illegible slide rule."[6] Although the 1976 Act has made some fundamental changes such as advancing the point in time when a copyright attaches and in expanding the categories of subject matter which are eligible for copyright. Congress specifically refused to create an exemption for use of copyrighted materials by educational institutions. By refusing to do so, Congress threw the problem of educational use of copyrighted material squarely into the fair use labyrinth eventually to be reflected in section 107 of the 1976 Copyright Law. Section 107 provides that reproduction of copyrighted material for "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, is not an infringement of copyright"[7] and the four factors determining fair use in any particular case would be:

(1) The purpose and character of the use;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used;
(4) the effect of the use upon the potential market for or value of the copyrighted work.

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4. HOUSE COMM. ON THE JUDICIARY, H.R. DOC. NO. 94-1476 at 62 (Sept. 3, 1976); *See also*, SENATE COMM. ON THE JUDICIARY HEARINGS ON § 11361 BEFORE THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS, OF THE HOUSE, 93d CONG., 1st SESS., 180-85 (1973).

5. Mazer v. Stein, 347 U.S. 201, 219 (1945); *See also*, REGISTER OF COPYRIGHTS, 87th CONG., 1st SESS.: COPYRIGHT LAW REV. REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 5 (House Judiciary Comm. Print 1961).

6. R. Mawdsley & S. Permuth, *Multiple Photocopying in Educational Institutions*, 10 NOLPE SCHOOL L.j. 18 (1981). *See also* S. Chaffee, *Restrictions on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 514 (1945).

7. 17 U.S.C. § 102.

Section 107 reflects the tension between access of educators to use, copy and/or distribute copyrighted material in schools and publishers or authors' expectation of economic return, a tension which Congress did not satisfactorily resolve. Holding out some hope for schools a recent court declared that "in judicial interpretations of the Old Act and under the New Act as well, the doctrine of fair use is more liberally applied in non-commerical and non-profit educational situations."[8]

However, a recent federal appeals court in *Marcus v. Rowley*[9] reversed the dismissal of a complaint against a school teacher for using copyrighted material without permission. The teacher had used approximately 50% of a booklet on cake decorating in preparing a learning activity package and that 50% amounted to virtually all the substance of the teachers book. The teacher's use was held to amount to substantial quantitative and qualitative copying of the copyright owner's booklet which militated against finding the teacher's use of copyrighted material to be fair use. The appeals court remanded the case to the district court for a determination on damages. If the *Marcus* decision becomes generally accepted, teachers will need to be circumspect in preparing lesson plans so that any material distributed to students does not violate fair use.

In an extra-legislative attempt to clarify fair use, three sets of guidelines pertaining to photocopying for classroom use,[10] photocopying of music and photocopying of interlibrary requests were negotiated between publishers/authors and the respective professional organizations with these guidelines subsequently being incorporated into the legislature history of the 1976 Law. The guidelines substantially restricted unauthorized copying and use of copyrighted materials.[11] For ease of consideration, copyright problems that pertain to schools will be discussed under four categories: Photocopying, Performance, Videotaping, and Computer Programs and Programming. Before discussing these categories it is important for the reader to understand that there are relatively few copyright cases to date dealing with educational institutions and that there are no distinctions in the Copyright Law between public and private schools.[12]

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8. Encyclopedia Britannica Educ. Corp. v. Crooks, 542 F. Supp. 828 (W.D.N.Y. 1982).
9. 695 F.2d 1171 (9th Cir. 1983).
10. A copy of these guidelines can be found at Mawdsley & Permuth, *supra* note 6 at 27-29 and at the end of this chapter.
11. R. Mawdsley & S. Permuth, *Copyright Laws: Practices and Limitations*, SCHOOL LAW IN CHANGING TIMES 194 (NOLPE/McGhehey, ed. 1982).
12. One distinction for private schools of a religious nature is that such schools do not infringe copyright when they engage in "performance of a nondramatic literary or musical work or of a dramatic-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly." 17 U.S.C. § 110(3).

Photocopying

Three copyright developments can be discerned in the area of photocopying: a distinction in enforcement between music and non-music areas, aggressive enforcement against commercial photocopy services, and problems arising under various State Open Records, Privacy or Truth-in-Testing statutes. The American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music Inc. (BMI), the two largest music licensing organizations in the United States have been actively investigating and prosecuting violations of the photocopying of music guidelines.[13] A distinction must be made between photocopying printed music and performance of that music both of which are protected by the copyright law. It is possible to violate one and not the other although both are generally involved in a lawsuit as for example in the fairly recent complaint against Longwood College, Farmville, Virginia.

In the Longwood College case filed in June 1980, three music publishers accused the college and one of its music teachers, Dr. Louard Egbert, Jr., of illegally reproducing copyrighted music by passing out copies and having the works performed. The plaintiffs, Oxford University Press of Oxford, England, the Theodore Presser Co. of Bryn Mawr, Pennsylvania and Novello and Co., Ltd. of Kent, England, sought a total of $500,000 in damages, including $50,000 statutory damages from each defendant for each violation plus costs and injunctions to halt future infringements. According to the complaint Dr. Egbert copied, distributed and directed a student performance of such songs as John Rutter's version of "Twelve Days of Christmas" and "Throw the Log On, Uncle John" without obtaining the permission of Oxford University Press and Presser, respectively, as well as pirating copies of the songs "Torches," "Here We Come A-Wassailing" and "There Is No Rose of Such Virtue" to which Novello claimed to own the rights.[14] This case was subsequently settled out of court with the college agreeing to pay $500 for each of the five songs used and $17,500 of plaintiff's attorneys fees.

On the other hand lawsuits gainst educational institutions for non-music related photocopying are virtually non-existent to date. One key difference is that ASCAP and BMI, in addition to collecting license payments from music users and then transferring these payments to members as royalties, have as one of their main functions the protection

13. *See* Broadcast Music, Inc. v. Papa John's Inc., 201 U.S.P.Q. 302 (N.D. Ind. 1979); For references to other lawsuits by BMI and ASCAP *see* 28 BULL. OF COPYRIGHT SOC'Y OF THE U.S.A. (Oct. 1980) 219 (Dec. 1980) 331 (Feb. 1981).

14. 28 BULL. OF COPYRIGHT SOC'Y OF THE U.S.A. 221-22 (Dec. 1980).

of those members they represent. On the other hand it is doubtful that educational publishing houses perceive their function in quite the same way. Manuscript publishers are generally chosen for their willingness to publish and promote. Such litigation as has arisen involving non-music publications has involved questions of ownership of copyright[15] and adequacy of the publisher's promotion.[16] Attorneys for educational publishing houses are very reluctant to discuss why their companies are not investigating and litigating violations of the Photocopying for Classroom Use Guidelines within educational institutions. However, some reasons can be conjectured. (1) Competition among educational publishing companies is keen. There may well be a latent fear among publishers that a lawsuit, or even a threatened lawsuit, could damage sales. (2) Multiple educational photocopying, even if violative of the guidelines, may be viewed by publishers as having worthwhile exposure factor by acquainting students with publications that are not well known. (3) From the teacher's point of view, the presence of similar or comparable materials from other publishers makes substitution fairly easy if one publisher is threatening legal action. Such substitution is probably not as easy in music. Publishing houses could face significant antitrust investigations if it appeared that they were agreeing among themselves to enforce the guidelines.[17]

In contradistinction to the absence thus far of lawsuits against educational institutions, publishers in at least two cases have secured consent decrees from commercial photocopy services adjacent to universities which services photocopied and sold multiple copies of copyrighted material for a fee.[18] Both consent decrees, virtually identical in form, provided that: (1) a single copy for a single person is not prohibited; (2) the reproduction of multiphotocopies for one person or

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15. Quinto v. Legal Times of Washington, Inc., CCH COPYRIGHT LAW REP. 16299 (D.D.C. 1981).

16. Dodd, Mead & Co. v. Lilienthal, CCH COPYRIGHT LAW REP. 16454 (S.D.N.Y. 1981).

17. As a result of antitrust suits under the Sherman Act both ASCAP and BMI are subject to consent judgments permitting them to negotiate only non-exclusive licenses with writers and publishers of musical compositions. United States v. Broadcast Music, Inc., 1966 TRADE CASES 83324 (S.D.N.Y. 1966); United States v. ASCAP, 1950 TRADE CASES 63750 (S.D.N.Y. 1950). However, recently the blanket licensing practice of ASCAP and BMI was held not to be a per se violation of the Sherman Act. Broadcast Music, Inc. v. C.B.S., 441 U.S. 1 (1979). In F.E.L. Publication v. Catholic Bishop, 1982 COPYRIGHT LAW DECISIONS 17150 (7th Cir. 1981), the plaintiff copyright holder could require each Roman Catholic parish to either enter into a yearly blanket license for performance of hymnal songs and limit the life of photocopies to the life of the license or pay a per copy fee without constituting a restraint of trade.

18. Basic Books Inc. v. The Gnoman Corp., CCH COPYRIGHT LAW REP. 16361 (D. Conn. 1981); Harper and Row Publishers, Inc. v. Tyco Copy Service, CCH COPYRIGHT LAW REP. 16361 (D. Conn. 1981).

the sale of one copy of multiphotocopies to one person is prohibited; and (3) multiphotocopies can be made for a faculty member of a non-profit educational institution where the faculty member certifies that the request complies with the "Guidelines for Classroom Copying."

An interesting development has been the interface of the copyright law and fairly new state Open Records, Privacy and Truth-in-Testing Laws. As a result of an inquiry from a Texas state agency whether the state should make copies of copyrighted maps pursuant to the requirements of Texas' Open Records Law the Texas Attorney General responded as follows: (1) The copyright law was not infringed by allowing members of the public to see copyrighted maps; (2) If members of the public want copies of the copyrighted maps they must make the copies themselves rather than have the state agency make the copies and then charge the requesting person for the expense.[19] The state of New York has fairly recently enacted a Truth-in-Testing statute requiring that copies of all standardized tests administered in New York along with the test answers and any evaluative studies done as a result of the testing be filed with the state education commissioner. The tests, answers and evaluative studies are then subject to public scrutiny and duplication. The Association of American Medical Colleges secured an injunction prohibiting duplication of MCAT standardized tests, test answers and evaluative studies on the basis of a protected copyright law property right.[20] The implications for private schools of these new developments is not clear except that if private schools are covered by state Privacy Acts it would be possible for students and/or parents to have access to, and duplicate, material otherwise subject to the protection of the copyright law. An expansive interpretation of fair use might allow duplication of such copyrighted material in one's file on the theory that it is somehow related to teaching, scholarship or research.

Photocopying Recommendations

(1) A faculty member has no more real effective rights than students as far as photocopying is concerned. An individual is entitled to a single copy of copyrighted material for purposes of teaching, research or scholarship. Teachers who assign each student to make a photocopy of a class assignment rather than have the teacher herself make multiple

19. CCH COPYRIGHT LAW REP. 16440, OP. TEX. ATT'Y GEN. (March 1981).

20. AAMC v. Carey, 482 F. Supp. 1358 (N.D.N.Y. 1980). *See Truth-in-Testing Laws: Copyright and Constitutional Claims*, 81 COL. LAW REV. 179 (1981).

photocopies for distribution are probably violating the copyright law although detections of such violations would be difficult.[21]

(2) Apart from fair use of photocopied material within the guidelines, at the present time there seems to be a greater likelihood that illegal photocopying will be more carefully scrutinized and investigated in the music area as opposed to the non-musical educational instruction area.

(3) In the non-musical area it is possible that multiple photocopying beyond the guildeines, solely for distribution to students registered for the class in which the materials are distributed, may be tolerated. Thus far the cases have dealt largely with commercial photocopy services.

(4) If state privacy laws mandate faculty and student access to private school files or if the private school receives funds administered by the Department of Education copyrighted material in student or faculty files such as copies of tests should be removed if possible. It is probably preferable to furnish copies of such copyrighted material in files if required to do so rather than face a lawsuit to compel duplication.

(5) Greater use of reserve books in libraries can be made rather than have each student purchase multiple copies of anthologies, compilations, etc. Libraries may have to be encouraged to purchase several copies of certain books for reserve use, which libraries may or may not be willing to do. Since students can each make one copy of copyrighted material for private study, research or scholarship purposes, students could photocopy desired selections from reserve books. But a word of caution: teacher assignments to have students individually copy the same selections would seem to be a substitute for the teacher making multiple copies and would probably be treated as if the teacher were making the copies herself.

(6) If certain selections in a number of books are fairly standard assignments each year, it may be worth exploring whether the copyright owners would consider publishing all the selections in a new anthology. One major, and perhaps insurmountable, problem would be to find a publisher who would publish this compilation for what could be a very limited market.

(7) Educational institutions may want to consider entering into annual license arrangements with copyright owners of the most extensively used materials. Because materials tend to become outdated, a yearly license can be negotiated only as long as teachers intend to distribute multiple copies of the covered materials.

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21. With respect to duplication by libraries the Senate Report states "if a college professor instructs his class to read an article from a copyrighted journal, the school library would not be permitted under 108(g) to reproduce copies of that article for members of the class.

(8) Despite the infrence that might be drawn from the article that a teacher may not want to seek legal counsel, legal advice on this complex problem of copyright law is absolutely necessary for every educational institution. Since teachers are agents of educational institutions, it is in the best interest of every institution to have a multiple-copy policy formulated with the help of competent counsel. The needs and problems of institutions can vary so much that policies need to be formulated in light of those specific needs and problems.

Performance

Performance problems are separate from photocoping but are often related to multiple photocopying questions concerning such items as play scripts, opera or operetta scores. The 1976 Copyright Law addresses performance inititally by distinguishing between places of performance.

Performance of literary or musical works, whether dramatic or non-dramatic, is exempted from Copyright Law if the performance occurs in a classroom or other place of educational instruction in a non-profit educational institution where face-to-face teaching occurs. The definition of performance is broad enough to include any recitation of literary selections or presentation of musical numbers. Places of educational instruction can include an auditorium or athletic field but they exclude any place where non-class members are involved, *e.g.*, general student assemblies. The performance exemption does not apply if outside musicians or performers are used.

Performances other than those in educational settings require addressing three concerns of the Copyright Law. The first is an understanding of the difference in definition between dramatic and non-dramatic. In non-classroom settings, dramatic works receive more protection than non-dramatic. Dramatic literary or musical works are those with sequential material with a plot and sequential story line, *e.g.*, opera, musical comedy, play, motion picture, filmstrips. Non-dramatic works include single songs and individual literary selections such as poems.[22] What is not clear from the definition is whether the character or a dramatic literary or musical work attaches to all portions of the work so that any portion performed individually still constitutes a dramatic literary or musical work. One author has observed that "a single song may be dramatically rendered, but that would not necessarily make it a dramatic composition. It would presumably have to be dramatic in its very nature and purpose."[23]

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22. H. HOWELL, THE COPYRIGHT LAW 52-53 (B.N.A. 1979).
23. *Id.* at 53. *See* M. Witmark & Sons v. Pastime Amusement Co., 298 F. 470, 490 (E.D.S.C. 1924).

The second problem concerns the transmission of copyrighted works. Transmission means communication of images or sound beyond the place from which they are sent. Transmission of non-dramatic literary or musical works only are exempt and only if (1) the works are part of a systematic instructional activity of a nonprofit educational institution; (2) transmission is of material assistance to teaching content; and (3) transmission is to places of instruction, to disabled persons, or to government employees as part of their official duties.

In response to a request from Lousiana State University regarding the effect of the university's broadcasting of band performances over radio and television the Louisiana Attorney General declared that band performances of non-dramatic music carried on radio and television are not exempt unless they meet the transmission exemptions.[24] A similar problem is addressed when radio music is played over loudspeakers. In a recent test case the United States Supreme Court refused to hear an appeal from district court and court of appeals decisions holding that a commercial establishment violated the copyright law when it broadcast radio music throughout its store by means of loudspeakers.[25] The store had argued that its practice should be protected by a provision in the Copyright Law that it is not an infringement of copyright to play music on " single receiving apparatus of a kind commonly used in private homes" as long as there is no charge to hear the broadcast and the broadcast is not "retransmitted to the public."[26] The federal courts rejected the store's argument declaring that connecting the radio to loudspeakers no longer made it a hometype radio.

A third problem concerns whether or not there is any direct or indirect commercial advantage. Non-dramatic literary or musical works are exempt as far as performance is concerned if (1) there is no direct or indirect admission charge; or (2) if there is a charge, any proceeds after reasonable costs must go exclusively for educational, religious, or charitable purposes and not for private financial gain. Fees or percentages cannot be paid to performers, producers, promoters, etc.; however, payment of performers, directors or producers whose function includes performance; *e.g.*, high school band director, is no violation.

Performance Recommendations

(1) Dramatic, as opposed to non-dramatic works, receive preferential treatment under the 1976 Act. From the point of view of time

24. CCH COPYRIGHT LAW REP. 15793 (OP. LA. ATTY GEN. (Oct. 1979).
25. Gap Stores v. Sailor Music, 1982 COPYRIGHT LAW DEUTRONS 16915 (2d Cir. 1982)__
26. 17 U.S.C. § 110(5)(A)(B).

invested by the copyright owner, unrestricted performances without payment of royalties for plays, operas, musical comedies, operettas may represent a more substantial quantitative economic loss to the owner than unrestricted performance of individual non-dramatic selections.

(2) The transmission problem is a separate concern and should be resolved separately from the questions of photocopying and performance. Educational institutions need to beware of broadcasting band performances at sports activities. It would appear that one way this problem is being overcome is to occupy halftime with color commentary and interviews in place of listening to the bands.

(3) Broadcast of music or other copyrighted material over school loudspeakers without permission would appear to violate the Copyright Law.

(4) Any kind of admission charge whether or not designated a donation to avoid state taxes requires some minimal bookkeeping. There should be a record of the costs of the production and if the admission proceeds exceed those costs there needs to be an accounting record of the ultimate use of the excess.

Videotaping

The 1976 Copyright Law, section 118(d)(3), allows non-profit institutions to videotape certain noncommercial educational TV broadcasts for use in face to face teaching activities but only if used within seven days of broadcast and then erased. Two kinds of concerns have been addressed by courts regarding videotaping.

In *Encyclopedia Britannica, Inc. v. Crooks,*[27] a federal district court in New York addressed itself to the problem of non-profit corporation organized under the New York Education Law which made and provided copies of videotaped television programs for delayed viewing in the public schools in Erie County. The corporation circulated to the public schools in Erie County a catalog of videotapes in its library which they kept for a varying amount of time before erasure. The corporation would videotape at no cost to the school programs from both educational and commercial stations. No admission charge was made to a student viewing any videotape. The district court granted plaintiff's request for a preliminary injunction over the corporation's defense that its videotaping was fair use since it was by a noncommercial body. The court's opinion is significant because even though the facts arose

27. 447 F. Supp. 243 (W.D.N.Y. 1978). The preliminary injunction was made permanent at 542 F. Supp. 1156 (W.D.N.Y. 1982).

under the 1909 Copyright Act, the reasoning of the court approximates more closely the 1976 Copyright Act. Besides the fact that the corporation failed to keep record of the number of times each film was displayed in the schools and that the corporation did not require return of the tapes, the court apparently was particularly persuaded by the fact that the substantiality test of fair use had been violated. Entire copyrighted films or programs had been reproduced. The court did add one item of dictum which may make the future for educational videotaping less foreboding than it may at first appear. The court noted that the videotaping in *Crooks* did not represent "an isolated instance of a teacher copyrighting copyrighted material for classroom use but concerns a highly organized and systematic program for reproducing videotapes on a massive scale."[28]

If educational systems cannot stockpile their own videotape libraries, the question still remains whether there may be other ways for educational institutions to have access to videotaped programs which are more than seven days old and which the institution does not have to purchase. This question was addressed in an oblique fashion in *Universal City Studios v. Sony Corporation of America.*[29]

In *Sony* the plaintiff sought to enjoin the sale of Betamax videotape recorders as violative of copyright law because individual owners were using the recorders in their homes to videotape plaintiff's motion pictures. The videotapes were kept by the Betamax owners and could be played back for an indefinite period of time as often as desired. The federal district court in *Sony* viewed this videotaping differently from the videotaping in *Crooks.* The court observed that the use in *Sony* was "noncommercial and does not reduce the market for plaintiff's entire work"[30] and that even though the videotaping involved copying the entire work the defense of fair use was not defeated "because all factors must be taken together.[31] The district court decision in *Sony* was subsequently reversed on the ground that videotaping was not a problem when congress enacted the law and thus there was no "firm expression of Congressional intent to carve out a major exception."[32] The appeals court found home recording to violate all aspects of section 107 fair use.

In an era of substantial financial retrenchment throughout education, the *Sony* appeals court has effectively prevented faculty members from videotaping programs at home for school use. Because the appeals court decision is virtually unenforceable, the United States Supreme Court

28. *Id.* at 252. *See also* 542 F. Supp. at 1179.
29. 480 F. Supp. 429 (C.D. Cal. 1979); *rev'd,* 659 F.2d 963 (9th Cir. 1981).
30. *Id.* at 456.
31. *Id.* at 454.
32. 659 F.2d 963, 969 (9th Cir. 1981).

may yet intervene to permit a practice that could assist immeasurably in the education process.

In a related area the California Attorney General has recently ruled that showing of video tapes of motion pictures purchased through retail stores would infringe the copyrights in the motion pictures when shown to prisoners in a state penitentiary without compensation and at which no members of the general public are present, the rationale being that videocassettes sold in retail stores contain an explicit license to perform the copy only in private homes and not for public performances.[33] Presumably the same rationale would apply to schools.

Videotaping Recommendations

(1) Representatives of non-profit institutions may be assigned the responsibility by the institution of videotaping certain noncommercial educational television broadcasts for subsequent use in face-to-face teaching activities as long as the videotape is used within seven days and then erased.

(2) School personnel as private citizens are considered to be infringing on copyrights when they videotape commercial or noncommercial television programs and keep those videotapes for subsequent home viewing. The *Sony* appeals court made a point that such a matter of convenience is not an educational purpose.[34]

(3) Videotaping of portions of "informational type works, as opposed to more creative works" for viewing by classes appeared to have fair use protection.[35]

Computer Programs and Programming

"Following a recipe to make a cake would not be an infringement of the copyright in the written recipe. However, producing the sounds indicated by notations on sheet music can constitute infringement of the written work. The use of a computer program falls between these two examples."[36] In 1974, as Congress was debating a new copyright law, it created a Commission on New Technological Uses (CONTU) to address what changes were necessary in light of new computer technology. The CONTU Report, not ready at the time of passage of the 1976 Copyright Act, was finally released in its final form on July 31, 1978. CONTU's

33. OP. CALIF. ATT'Y GEN. 81-503 (Feb. 5, 1982).
34. 659 F.2d at 979.
35. *Id.*
36. Koening III, *Software Copyright: The Conflict Within CONTU*, 27 BULL. OF COPYRIGHT SOCY OF THE U.S.A., 340, 366 (1979/80).

report was by no means unanimous; there was a majority report, a concurring opinion by Commissioner Nimmer and dissenting opinions by Commissioners Hersey and Karpatkin. All members of CONTU agreed that computer programs in the form of a set of written instructions were entitled to copyright protection. The controversy developed when the commissioners attempted to determine whether the instructions themselves as they are transformed into a form which can be used to operate the computer, their binary representation, should be protected. The majority essentially took the view that such use is nothing more than a copy of the written program[37] and should be protected on the theory that all computer programs embody the programmer's expression.[38] To accomplish this purpose, the majority recommended to Congress that section 101 of the 1976 Act be amended to define "computer program" as "a set of statements of instructions to be used directly or indirectly in a computer in order to bring about a certain result."[39] Commissioner Hersey in his dissent distinguished between computer programs primarily designed for communication to the computer system which should not be protected and those "various forms of 'writing' which were perceived, in every case, by the human sense for which they were intended; written words by the human eye, music by the ear, paintings by the eye, and so on which should be protected."[40] The difference between the two opinions has at its foundation the majority's concern to prevent unauthorized reproduction[41] and the dissent's concern about unnecessarily inhibiting access, increasing transactional costs, and reinforcing oligopolgy.[42]

Congress subsequently made two significant changes in the Copyright Law as relates to computer programs. In December 1980 Congress adopted the CONTU definition of "computer program" and authorized the owner of a computer program to make a copy where it is "an essential step in the utilization of the computer program in conjunction with a machine, or where it is "for archival purposes only" and will be destroyed when rightful use of the computer program ceases.[43] An exact copy pursuant to section 117 can be leased, sold or otherwise transferred with the computer program but an adaptation of the computer program can be leased, sold or otherwise transferred only with the authorization of the copyright owner.[44] These amendments of

37. CONTU REP. (July 31, 1978) at 31.
38. *Id.* at 53.
39. *Id.* at 30.
40. *Id.* at 90.
41. *Id.* at 38-47.
42. *Id.* at 84-88.
43. 17 U.S.C. § 101, 117.
44. *Id.* at § 117.

Congress reflect less an attempt at accommodation between the CONTU report's majority and minority views as it probably does a recognition that the making of a single copy of a computer program by a valid copyright owner would be considered fair use.

The extent to which valid copyright owners can copy and distribute copies to others of the programs they have purchased or leased has become a frequently litigated subject under the 1976 Act. The recent case of *Data Cash Systems, Inc. v. J. S. & A. Grap, Inc.*,[45] decided under the 1909 Copyright Law, may provide some insight into the resolution of future problems. The plaintiff, Cash Systems, Inc. brought a copyright infringement action because defendant had copied and sold a silicon chip which was part of a computer chess game designed and marketed by plaintiff. The district court dismissed plaintiff's complaint on the ground that the reproduction was not a "copying" under the 1909 Act. The court of appeals affirmed the decision but for a different reason. The appellate court decided that plaintiff had not protected his copyright under the 1909 Act by failing to place a copyright notice on the silicon chip itself. The appeals court never addressed itself to the substantive question as to whether reproduction of a silicon chip is a copying, primarily because the court ruled that the 1976 Copyright Law was inapplicable. As a result of the *Data Systems* case it would seem that once the notice requirements are satisfied under the 1976 Act, any unauthorized reproduction of computer hardware (chips) or software (discs, tapes, cassettes) would be an infringement.

The Second Circuit Court of Appeals has recently expanded the computer copyright to video games. The court concluded that the repetitive sequence of electronic images is copyrightable as an audiovisual display and that the underlying written program has an independent existence and is itself eligible for copyright.[46]

Despite enhanced copyright protection for computer programming, effective enforcement against copyright infringements may depend upon several practical considerations rather than legal ones. First, detection of violations in an industry as large and competitive as computer programming would be formidable. There apparently has been some consideration given to establishing an ASCAP-type organization to protect computer program copyrights but the cost would seem to be prohibitive. Second, the difference between sale vs. non-sale distribution of computer programs not only raises questions about detection

45. 628 F.2d 1038 (7th Cir. 1980).

46. Stern Electronics, Inc. v. Kaufman, 1982 COPYRIGHT LAW DECISIONS 16991 (2d Cir. 1982).

but also questions about enforceability. How willingly are federal prosecutors going to prosecute alleged infringement cases under the copyright law's criminal sanctions where the copying and distribution involves no substantial monetary gain? How would the sales of a company manufacturing computer programs be impacted among educational institutions in general if an infringement action were filed against specific educational institutions? Third, the cost of seeking civil damages for copyright infringement would seem to make it possible to sue primarily only those infringers who realize monetary gain. Financial profit from improper sale of computer programs would assist a plaintiff in proving an intent to infringe and thus result in a possibly substantial damages receovery; but absent any financial gain, intent to infringe may be more difficult to prove and damages may be minimal or non-existent.[47]

Computer Programs and Programming Recommendations

(1) Computer programs, whether they comprise the original written instructions or the instructions as transformed onto a form to operate the machine, may be copied by the computer program owner as long as the copying is restricted to one copy.

(2) Multiple copying and distribution within the system of computer programs by educational institutions, if done for financial gain, may escape infringement actions, not because the copying is permissible, but because the infringed upon computer program copyright owner cannot afford the financial cost or adverse publicity of an infringement action.

(3) Private schools involved in the creation of computer programs are probably aware that at the present time computer program manufacturers are dedicating substantial technological and financial energy into developing copy protection devices to prevent all copying. If attempts at developing such devices are successful the problem of unauthorized copying would be substantially reduced.

(4) Presently, confidentiality and secrecy are still the most effective forms of protection in the software industry, and this protection is being accomplished through contractual convenants in licensing and by sale of software and dissemination of only cryptic versions of the program.[48] Obviously, private schools embarking upon the production of

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47. It appears that courts are not willing to allow the absence of economic harm to plaintiff to prevent defendant's liability. *See* Encyclopedia Britannica, Inc. v. Crooks, 542 F. Supp. 1156, 169 (W.D.N.Y. 1982).

48. CONTU REPORT (July 31, 1978) at 76. *See also* D. Jacobson, *Computer Software Theft Protection*, 39 BENCH AND BAR 61 (1982).

computer programs should engage competent copyright counsel to assure protection of copyright interests.

Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with Respect to Books and Periodicals

The purpose of the following guidelines is to state minimum and not the maximum standards of educational fair use under section 107 of H.R. 2223. The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types of copying permitted under these guidelines may not be permissible in the future; and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.

Moreover, the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in section 107 of the Copyright Revision Bill. There may be instances in which copying does not fall within the guidelines stated below which may nonetheless be permited under the criteria of fair use.

Guidelines

I. Single Copying for Teachers
A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:
   A. A chapter from a book;
   B. An article from a periodical or newspaper;
   C. A short story, short essay or short poem, whether or not from a collective work;
   D. A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper;

II. Multiple Copies for Classroom Use
Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion; provided that:
   A. The copying meets the tests of brevity and spontaneity as defined below; and,
   B. Meets the cumulative effect test as defined below; and,
   C. Each copy includes a notice of copyright.

Definitions of Brevity

1. Poetry: (a) A complete poem of less than 250 words and if printed on not more than two pages or, (b) from a longer poem, an excerpt of not more than 250 words.
2. Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words of 10% of the work, whichever is less, but in any event a minimum of 500 words.
   (Each of the numerical limits stated in 1 and 2 above may be expanded to permit the completion of an unfinished line of poem or of an unfinished prose paragraph.)
3. Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.
4. "Special" Works: Certain works in poetry, prose or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph 2 above notwithstanding such "special works" may not be reproduced in their entirety; however, an excerpt comprising not more than two fo the published pages of such special work and containing not more than 10% of the words found in the text thereof, may be reproduced.

Definitions of Spontaneity

1. The copying is at the instance and inspiration of the individual teacher, and
2. The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time it would be unreasonable to expect a timely reply to a request for permission.

Definitions of Cumulative Effect

1. The copying of the material is for only one course in the school in which the copies are made.
2. Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.
3. There shall not be more than nine instances of such multiple copying for one course during one class term.
   (The limitation stated in 2 and 3 above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.) 122

III. Prohibitions as to I and II Above

Notwithstanding any of the above, the following shall be prohibited:

A. Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts therefrom are accumulated or reproduced and used separately.

B. There shall be no copying of or from works intended to be "consumable" in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.

C. Copying shall not:

1. Substitute for the purchase of books, publishers' reprints or periodicals;
2. Be directed by higher authority;
3. Be repeated with respect to the same item by the same teacher from term to term.

D. No charge shall be made to the student beyond the actual cost of the photocopying.